

78-1862

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED

JUN 14 1979

MICHAEL RODAK, JR., CLERK

FRED N. WALKER, Petitioner,

v.

ARMCO STEEL CORPORATION, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

James M. Renegar
3829 N. Classen Blvd.
Oklahoma City, OK. 73118
Attorney for Petitioner

Don Manners
1510 North Klein
Oklahoma City, Oklahoma 73106
Attorney for Petitioner

Mr. Richard L. Keirse
Looney, Nichols, Johnson & Hayes
219 Couch Drive
Oklahoma City, Oklahoma 73102
Attorney for Respondent

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions Presented	2
Statutory provisions involved	2
Statement of the case	3
Reasons for granting the writ	3
1. The Decision Below Conflicts With the Decision of Other Courts of Appeals as to the Prop- er Interpretation of 28 U.S.C. § 1359	3
2. The Decision Below Raises Signi- ficant and Recurring Problems Concerning Efforts To Invoke and Create Federal Diversity Jurisdiction.	5
Conclusion	7
Appendix (Opinion and Judgment of Court of Appeals) App.	1

CITATIONS

Cases:

Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971)	6
Erie R. Co. v. Tompkins, 326 U.S. 99 (1945)	4
Groninger v. Davison, 374 F.2d 638 (8th Cir. 1966)	6
Guaranty Trust Co. v. York, 326 U.S. 99, 65, S.Ct., 1464	5
Hanna v. Plumer, 380 U.S. 460 (1965).	4
Lumberman's Mutual Casualty Co. v. Wright, 322 P.2d 759, (C.A. 5th Cir. 1963)	5
Prashar v. Volkswagen of America Inc., 480 F.2d 947 (8th Cir. 1973)	6
Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949)	4

	Page
Sylvestri v. Warner & Swasey Co., 398 F.2d 598, (2nd Cir. 1968)	6
Witheron v. Firestone Tire and Rubber Co., 530 F.2d 160 (3rd Cir. 1976)	6

IN THE
SUPREME COURT OF THE UNITED STATES

Term, 1979

No.

FRED N. WALKER, Petitioner,

v.

ARMCO STEEL CORPORATION, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The petitioner, Fred N. Walker respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 14, 1979.

OPINION BELOW

The opinion of the Court of Appeals, 529 F.2d 1133, appears in the Appendix hereto. The Memorandum opinion of the District Court for the Western District of Oklahoma also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 14, 1979. Application for extension of time to file petition of writ of certiorari granted on May 16, 1979, extending the time to June 14, 1979. This petition was timely filed within that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

1. Whether in a federal diversity action, the question of when the action has been commenced is to be governed by the Federal Rules of Civil Procedure or by the state law of the district where suit is filed.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 3
Commencement of Action - A civil action is commenced by filing a complaint with the Court.

Oklahoma Statutes Annotated, Title 12, § 97 (West Supp. 1978).

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him or a codefendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to

procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons within sixty (60 days)".

STATEMENT OF THE CASE

On August 22, 1975, Fred Walker was seriously injured when a nail head fragment lacerated his right eye. This particular nail, manufactured by Armco Steel Corporation, shattered while Mr. Walker was trying to drive it into a cement wall. As a result of the accident, Fred Walker, pursuant to Rule 3 of the Federal Rules of Civil Procedure, commenced a lawsuit by filing the complaint on August 19, 1977, in the United States District Court for the Western District of Oklahoma.

On December 1, 1977, Armco Corporation was properly served with process, and on January 5, 1978, filed a Motion to Dismiss plaintiff's complaint for the reason that the statute of limitations barred the action.

Armco's Motion to Dismiss was sustained by order of District Court Judge Ralph Thompson on April 18, 1978. On February 14, 1979, the United States Court of Appeals for the Tenth Circuit affirmed the decision, basing its ruling on the holding in the case of Ragan v. Merchants Transfer & Warehouse Co., Inc. 377 U. S. 530 (1949). See p. 7 Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. The decision below raises significant and recurring problems concerning the

application of the Federal Rules of Civil Procedure in a federal diversity action.

The decision by the Tenth Circuit in the case at bar is indicative of the dilemma that has confronted the Courts and parties to litigation as a result of the conflicting decisions of Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530 (1949) and Hanna v. Plumer 380 U. S. 460 (1965). The problem can be more simply stated as: Should State or Federal procedure rules apply in a federal diversity action? Under Ragan the state procedure controlled and under Hanna Rule 3 of the Federal Rules of Civil Procedure was applied.

These two decisions are a part of a line of cases that began with Erie R. Co. v. Tompkins 326 U. S. 99 (1945). The thrust of these decisions was to prevent substantial enlargement of state-created rights by the federal courts. This was to ensure that the rights of the parties would be essentially the same whether the action is brought in a state forum or a federal forum.

Erie succeeded in insuring that the state substantive law be applied in the federal forum. But, the decisions of Hanna and Ragan have created a confusion in procedural law that will continue until this Court clarifies the status of Ragan.

The two decisions are in direct conflict. In Ragan the Court affirmed a decision by the Tenth Circuit that a Kansas statute, similar to the Oklahoma Statute in question, was an "integral part" of the state's statute of limitations and governed by the "outcome-determinative"

test of Guaranty Trust Co. v. York, supra. Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530, 523.

In 1965 the Court handed down the decision of Hanna, concerning conflicting state and federal procedural rules. The ruling was that when there was a conflict the federal rules should prevail. The reason being that the goal of the Federal Rules of Civil Procedure was to promote uniformity. The Court, stating that Erie had never been used to invalidate a federal rule of procedure, said:

"The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers- when there are 'affirmation' and when there is Congressional mandate (the rules) supported by constitutional authority."

Hanna v. Plumer, 380 U.S. 460, 473, citing Lumberman's Mutual Casualty Co. v. Wright, 322 P.2d 759, 764 (C.A. 5th Cir. 1963).

Thus, the situation is that Hanna did not expressly overrule Ragan but the decisions cannot be reconciled. In the case at bar the Oklahoma statute was held to be an "integral part" of the statute of limitations, in accordance with the Ragan decision. By the same token, the Tenth Circuit Court of Appeals recognized that Hanna and Ragan are directly conflicting decisions which must be reconciled to achieve a uniform federal code of procedure.

2. The decision below conflicts with the decisions of other Court of Appeals

which have confronted the Hanna - Ragan dilemma.

Because the Ragan decision was simply distinguished by Hanna, the circuits are divided on the question of whether Ragan is still good law. The Tenth Circuit has decided to follow the majority in finding that since Ragan was not expressly overruled it must be continued to be considered good law. See Appendix, Witherow v. Firestone Tire and Rubber Co. 530 F.2d 160 (3rd Cir. 1976), Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971), Groninger v. Davison, 374 F.2d 638 (8th Cir. 1966).

On the other hand, in the Second Circuit, Hanna has been dogmatically followed. There the Court said: "Hanna requires consideration of the factors underlying the choice between the state and federal rule rather than the automatic application of Ragan." Sylvestri v. Warner & Swasey Co., 398 F.2d 598, 605 (2nd Cir. 1968).

Furthermore, some of the circuits that follow Ragan today have done so reluctantly, expressing a preference for the federal rules and expressing hope that the Supreme Court would clear away the dilemma which exists as a result of the conflict between these two opinions. See Appendix and Prasher v. Volkswagen of America, Inc. 480 F.2d 947, 950 (3th Cir. 1973).

Justice Doyle, speaking for the Court below remarked that "The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between Ragan and Hanna." The issues encompassed in the case at bar fall squarely within those "considerations" listed in Rule 19 (b) of the Rules of the

Supreme Court of the United States. Nearly every circuit has faced the Hanna/Ragan question - the need for a single clarifying decision from this Court is paramount.

CONCLUSION

For the aforementioned reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectively submitted,
DON MANNERS,
1510 North Klein
Oklahoma City, Oklahoma 73106
Counsel for Petitioner

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 78-1477

FRED N. WALKER,)	
)	
Plaintiff-Appellant,)	
)	
v.	)	Appeal from
	)	the United
ARMCO STEEL CORPORATION,	)	States District
a corporation,	)	Court for the
	)	Western District
Defendant-Appellee.	)	of Oklahoma (D.C.
	)	No. 77-0816-T)

Submitted on the briefs.

Don Manners of Manners, Cathcart & Lawter,
Oklahoma City, Oklahoma, for the Plaintiff-Appellant.

Burton J. Johnson and Richard L. Keirsey
of Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, for Defendant-Appellee.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is a Calandar C case.

This is a diversity action which raises the question whether Rule 3 of the Federal Rules of Civil Procedure or § 97 of Okla. Stat. title 12 (West Supp. 1978) determines when a case is filed in the Federal Court. Is it a state law or federal question? The underlying problem is whether Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) or Hanna v. Plumer, 380 U.S. 460 (1965) governs.

The United States District Court for the Western District of Oklahoma dismissed the action on the ground that it was outlawed by the statute of limitations in Oklahoma because it had not been filed in accordance with the Oklahoma rule; that although the case was actually filed in time, process was not served within the period of limitations prescribed by the Oklahoma statute. The trial Court reasoned that the Oklahoma filing rule was integrated in the pertinent Oklahoma limitations provision. The trial Court ruled that Hanna v. Plumer, supra, did not expressly overrule Ragan v. Merchants Transfer & Warehouse Co., supra, and, therefore, the latter case governed.

The facts are these:

Appellant Walker suffered an injury when a nailhead fragmented and hit his right eye, on August 22, 1975, while he was engaged in his work. The suit against Armco Steel Corporation, the manufacturer of the nail, alleges that the nail was defective. The complaint was filed in the Clerk's office of the United States District Court for the Western District of Oklahoma on August 19, 1977. Summons

was issued the next day. For reasons which do not appear in the record, process was not served on Armco until December 1, 1977. On January 5, 1978, Armco filed a Motion to Dismiss Plaintiff's complaint asserting that the statute of limitations barred the action. The Motion was granted on April 18, 1978. The date of filing was three days prior to the date that the two-year statute would have barred the action. The issue, as indicated above, is when, if ever, the statute of limitations is tolled.

The Oklahoma statute which was relied on by the trial Court and which is here sought to be applied reads:

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him or on a codefendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. At attempt to commence an action shall be deemed equivalent to the commencement thereof; within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons, within sixty (60 days).

Okla. Stat. Ann. tit. 12, § 97 (West Supp. 1978).

The above statute makes provision for faithful and diligent endeavor to procure service if it is carried out within sixty (60 days) of date of issuance, provided

the summons is issued within the limitations period. Although the summons here was shown to have been issued on time, the service was not completed within sixty (60 days), nor is there any evidence that there was a diligent attempt to procure service. Therefore, the only hope which the plaintiff-appellant could entertain would be that the federal procedural provision would be ruled applicable.

There is another provision in the Oklahoma compilation, Okla. Stat. Ann. tit. 12, § 151 (West Supp. 1978), which provides that:

A civil action is deemed commenced by filing in the office of the Court Clerk of the proper Court a petition and by the clerk's issuance of summons thereon. Where service by publication is proper, the action shall be deemed commenced at the date notice of publication is signed by the Court Clerk. Where service is sought to be effected by mailing, the action shall be deemed commenced when the envelope containing summons, addressed to the defendant or to the service agent if one has been appointed, is deposited in the United States mail with postage prepaid for forwarding by certified mail with a request for a return receipt from addressee only.

There is no indication, however, that this adds anything to § 95 and 97, both of which are construed by the Oklahoma Court of Appeals and the Supreme Court as limitation provisions.

The applicable Federal Rule is free of all of these complications. Rule 3 of the Federal Rules of Civil Procedure simply provides: "A civil action is commenced by filing a complaint with the Court."

The question which we must consider is whether the Oklahoma statute, § 97, must be applied as the trial Court applied it or whether Rule 3 of the Federal Rules of Civil Procedure should have been held to govern. The underlying issue is whether the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) is, consistent with the basic diversity notion that a Federal Court, sitting in diversity cases and administering state law, must apply not only substantive law of the forum state, but procedural law as well if the application of state procedural law changes the outcome of the case.

Unquestionably, § 97, supra, (the Oklahoma statute), is in direct conflict with Rule 3 of the Federal Rules of Civil Procedure with respect to what constitutes a filing which will toll the statute of limitations. That the Oklahoma provision is not only a filing provision but a limitations one was well is to be gleaned from the statute as well as the cases. See, for example, Tyler v. Taylor, Okl. App., 478 P.2d 1214 (1977), and State ex rel. Roacher v. Caldwell, Okl., 522 P.2d 1031 (1974). So even though the Oklahoma statute may be complex and even mysterious as compared with the federal provision in that it obligates the litigant not only to timely file the case but also to see that process issues and that the adversary is served on time in order to toll the statute of limitations, it is the law of Oklahoma. The fact that the local law appears technical and cumbersome is not a factor to be weighed. The controlling aspect is whether the outcome of the case is changed as a result of applying or not applying the state rule.

In support of the mentioned approach, defendant-appellee urges that the Supreme

Court's decision in Ragan v. Merchants Transfer & Warehouse Co., supra, which held state law to be applicable in deciding when a case has been filed for purposes of tolling the statute of limitations, governs. Ragan, it is to be noted, is a decision which originated in this circuit, and a Kansas statute similar in terms to the Oklahoma statute before us (§ 97, supra), was applied in preference to the federal rule on the same subject. As in the present case, the Kansas statute required filing of the complaint, issuance of the summons and service of the summons. All of these were tied to the limitations statute. Indeed this Court upheld the District Court determination that the requirement of service of summons within the statutory limitation "was an integral part of that state's statute of limitations".

Ragan, of course, religiously followed Guaranty Trust Co. v. York, 326 U.S. 99 (1945). The outcome test was thus held to apply even in this area of pure procedure. The question boils down to whether Ragan must be applied here.

The Supreme Court's decision in Hanna v. Plumer, supra, gave promise that the corner had been turned so to speak, as far as Guaranty and Ragan continuing to dominate where the question is one of pure procedure such as we have here. Hanna construed a Massachusetts statute which had the same kind of complicated statute with respect to mode of service of process as we find here. In Hanna, as here, the application of the outcome test would have resulted in the state law being applied and in the defendant prevailing. In the opinion which was written by Chief Justice Warren, the outcome determinative test was

rejected and the Federal Rules of Civil Procedure were ruled applicable. However, the Court in a footnote distinguished Ragan even though Ragan had applied the outcome determinative test which the Court was engaged in rejecting at least to the extent that pure procedural questions were being decided. The Hanna opinion observed that every procedural variation is in fact outcome determinative. The Court acknowledged that the outcome determinative test would have a marked effect on the outcome of litigation before it. It said, however, that the test was not to be regarded as a talisman. Inasmuch as Ragan is based entirely upon the Guaranty Trust conception that outcome determinative is the answer, the refusal of the Court to apply this result in the Hanna decision is irreconcilable with that in Ragan.

We simply point up the dilemma. We do not do so in any spirit of criticism. The present problem is, however, that the Supreme Court in Hanna, although it could be said to have shown dissatisfaction with Ragan, did not expressly overrule it. Professors Wright and Miller have pointed this out and have noted also that the Supreme Court knows how to overrule a case when it wishes to do so. They further observe that Ragan has continued vitality. See 4 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1057 at 190-191 (1969). It is true, however, that although the circuits are divided on the question, the preponderance of the circuits and the district courts within the circuits support the view that Ragan continues to be viable.

More recently this Court rendered an opinion which selected Rule 3 of the Federal Rules of Civil Procedure. This was

in Chappell v. Rouch, 448 F.2d 446 (10th Cir. 1971). This action arose in Kansas as did Ragan, but the statute which was considered in Ragan had been modified. The reasoned opinion by Judge McWilliams concluded that Ragan was not binding in view of this fact. The Oklahoma statute which we consider, however, is indistinguishable from the statute which was construed in Ragan, so even if we were desirous of applying Rule 3, which we are, we are not free to do so. (This writer at least would prefer the federal rule).

This Court has recently issued its opinion in Lindsey v. Dayton-Hudson Corp., No. 77-1051. The opinion by Judge Logan is extremely well presented and it too adopts the view that Ragan continues to be authoritative.

We recognize that decisions are frequently allowed to die on the vine, so to speak. We also recognize that in such instances death does not, as a practical matter, take place. If, however, Ragan was intended to die a natural death, it failed to happen.

In the Tenth Circuit we have in addition a judicial administration problem, because since the Ragan case originated here it continues to be the law of this circuit. The Tenth Circuit affirmed the trial Court's decision, and the Supreme Court not only affirmed the Tenth Circuit, but lavishly praised the decision as well.

The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between Ragan and Hanna. So far

it has not done so, and until the Supreme Court acts we feel constrained to follow Ragan.

Accordingly, the judgment of the District Court is affirmed.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FRED N. WALKER,)
)
 Plaintiff,)
)
 vs.) Appeal from the
) United States
 ARMCO STEEL CORPORATION,) District Court
) for the Western
) District of
 Defendant.) Oklahoma (D. C.
) No. 77-0816-5)

ORDER

Jurisdiction in this action, for personal injury, is founded upon 28 U.S.C. §1332. Plaintiff's complaint states that he received injuries from defendant's tortious acts on August 22, 1975. Complaint was filed August 19, 1977, three days before the action would have been barred by the Oklahoma statute with process on December 1, 1977. Defendant's motion to dismiss presents an essentially simple question which has no concrete answer in this jurisdiction; i.e., when is an action "commenced" in federal court, so as to toll the statute of limitations?

The Oklahoma statute of limitations for tortious injuries is two years. 12 O.S. 1971, § 95. An action is commenced in state court when process issues, provided process is actually served within sixty (60) days after the attempt is made. 12 O.S. 1971, § 97; Lake v. Lietch, 550 P.2d 935 (Okla. 1976). Plaintiff admits that had this action been filed in state court and service not made until December

1, it would be barred by the statute of limitation.

In federal court, an action is commenced when the complaint is filed. Rule 3, Federal Rules of Civil Procedure. Until 1965, Rule 3 was construed so as to incorporate the entire state statutory scheme for tolling the statute of limitations into federal procedure. Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530 (1949); Murphy v. Citizens Bank of Clovis, 244 F.2d 511 (10th Cir. 1957). However, in Hanna v. Plumer, 380 U.S. 460 (1965), the Supreme Court, in determining propriety of service, relied on Federal Rule 4d, rather than state law, which was in conflict. The Court in Hanna did not overrule Ragan v. Merchants Transfer & Warehouse Co., supra, in fact, Ragan was distinguished by the Hanna Court at page 469. However, following the Hanna decision, the circuits have been in conflict as to whether state law or Federal Rule 3 governs commencement of a suit. The majority rely on Ragan and determine commencement of suit by applying state law. Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160 (3rd Cir. 1976); Anderson v. Papillion, 445 F.2d 841 (5th Cir. 1971); Groninger v. Davison, 364 F. 2d 638 (8th Cir. 1966); Sylvester v. Messler, 246 F. Supp 1 (E.D. Mich. 1965), aff'd 351 F.2d 472 (6th Cir. 1965), cert. denied 382 U.S. 1011. See also Dial v. Ivy, 370 F.Supp. 833 (W.D. Okla. 1974), where the Court held that the state statute controlled, without commenting on Hanna. For the minority view, see Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2nd Cir. 1968).

The Tenth Circuit has withheld decision on this issue. In Chappell v. Rouch, 448 F.2d 446 (10th Cir. 1971), the Tenth

Circuit was presented with a question of whether Kansas law or the Federal Rules of Civil Procedure governed the commencement of suit so as to toll the Kansas statute of limitations. The trial court had overruled a motion to dismiss, holding that Federal Rule 3 determined when suit was commenced because Hanna v. Plumer had "modified Ragan to the end that the federal rule, rather than the state statute, controls and fixes the time the action was commenced." (Chappell at 448.) The Tenth Circuit commented on the trial court's ruling, stating:

"In our view of the matter, however, Ragan is distinguishable on its facts from the instant controversy and though we agree that Hanna governs, we need not here come to grips with the intriguing question as to whether Hanna overrules Ragan, a matter on which there is considerable differences of judicial thought." Id at 448.

The Court went on to distinguish the Ragan rule from the facts before it. The Kansas statute relied on by the defendant was not an "integral" part of the Kansas statute of limitations. The Kansas statute defining commencement of actions was in the chapter on civil procedure and was not inextricably intertwined with the statute of limitations. The chapter entitled "Limitation of Actions" had no provision defining when and how commencement of actions would toll the statute of limitations. The Court summarized and concluded as follows:

"The narrow issue now to be resolved is whether we are prepared to hold that K.S.A. 60-203 (defining commencement of suit) is an 'integral part' of K.S.A. 60-501 and 60-513 (4) (statutes of

limitation). If we do so hold, then Ragan would control, assuming Ragan has not been modified, if indeed not overruled, by Hanna. As indicated, we need not here make that determination as in our view K.S.A. 60-203 is not under the circumstances an integral part of K.S.A. 60-501 and just what the Kansas legislature declared it to be, a statute setting forth a rule of civil procedure. So, it boils down to a determination as to whether a Kansas statute promulgating a rule of civil procedure as to when an action is commenced takes precedence in the federal courts over Fed.R.Civ.P. 3, with which it is in direct conflict. All of which brings into play the rule of Hanna." Chappell, at 449.

The Oklahoma statute before the Court today is an integral part of the Oklahoma statute of limitations. 12 O.S. 1971, § 97, defining commencement of suit, is codified in the chapter entitled "Limitations of Actions". Section 97 states that "an action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him . . ." (Emphasis added). The preceding sections in the article define the statute of limitations for various types of injuries. 12 O.S. 1971, §97 is an integral part of the Oklahoma statute of limitations and would bar this suit if Ragan is still the law.

Having no express ruling from the Tenth Circuit on the effect of Ragan on these facts, this Court is free to threat the question as one of first impression. The Court is persuaded that Hanna did not overrule Ragan. The United States Supreme Court has not been shy to overrule cases expressly, and the fact the

Supreme Court not only did not overrule Ragan, but in fact distinguished it, in Hanna, persuades this Court that Ragan still controls. Even limiting Ragan to its facts, dismissal of this suit is required. The Oklahoma definition of commencement of action is an integral part of the Oklahoma statute of limitations. The rule of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) requires that in diversity cases, litigants in federal court receive no advantages over those in state court. To ignore the Oklahoma statute in question here would give plaintiff greater rights in federal court than he would receive in state court a result not allowed after Erie.

Plaintiff's complaint, on its face, is barred by the Oklahoma statute of limitations and the Oklahoma definition of commencement of suit. Accordingly, defendant's Motion to Dismiss is granted, and plaintiff's complaint is, by this order, dismissed.

It is so ordered this ____ day of April, 1978.

United States District Judge

Supreme Court, U. S.
FILED
NOV 14 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit**

PETITION FOR CERTIORARI FILED JUNE 14, 1979

CERTIORARI GRANTED OCTOBER 1, 1979

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit

INDEX

	PAGE
DOCKET SHEET (District Court) follows Index	
PETITION	A-1
SUMMONS	A-5
MOTION TO DISMISS	A-6
DISTRICT COURT OPINION	A-7
TENTH CIRCUIT OPINION	A-11

DIST/OFFICE	YR.	NUMBER	MO.	DAY	YEAR	N/S	O	R	23	\$	500	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET
1087	5	77-0816	08	19	77	365	1	13					8708		77-0816

PLAINTIFFS

DEFENDANTS

CIV - 77-0816 T

Walker, Fred N.

Armco Steel Corporation, A Corporation

CLOSED APR 18 1978

ATTORNEYS LIEN
CLAIMED

CAUSE

28 USC 1332 - Damages re personal injury result of head on nail shattering when hit, striking Pltf. in the eye.

rw

FOR PLAINTIFFS

ATTORNEYS

FOR DEFENDANTS

Don Manners, Of Manners, Grennan, Cathcart, &
Lawter, 1510 N. Klein, OC 73106
236-4534

Looney, Nichols, (Burton J.) Johnson & Hayes
219 Couch Dr, OC 73102
& Richard L. Keirsey

☐ CHECK
HERE
IF CASE V. AS
FILED IN
FORMA
PAUPERIS

FILING FEES PAID
RECEIPT NUMBER

DATE

C.D. NUMBER

STATISTICAL CARDS

CARD

DATE MAILED

JS-5

8-31-77

JS-6

4-30-78

UNITED STATES DISTRICT COURT DOCKET

DC-111 (rev. 1)

CIV-77-086T

DATE	NR.	PROCEED
8-19-77		Filed Complaint
"		" prae for & iss'd summons
12-5-77		Filed USM's Ret re Summons: Served The Corporation Company 12-1-77
12-21-77		Filed dft's Answer - ws
1-5-78		Filed dft's Mtn to Dism - ws
"		" Brief in Sup of Above Mtn - ws
1-12-78		Ent Order directing plf to file response w/brief w/i 20 days herefrom to dft's mtn to dism (Thompson) afj ws
2-1-78		Filed plf's Reply Brief to Dft's Mtn to Dism - ws
3-1-78		Filed Dft's Response to Plf's Reply Brief -w/s
4-18-78		Filed AND ENTERED Order - THAT dft's Mtn to Dism is grtd, & plf's compl is, by this order, dismd (Thompson) (COB #125) (Clerk) (Copies to parties - afj)
5-16-78		Filed Notice of Appeal of plf from final order sust. dft's mtn to dism. entered Apr 18, 1978 (record due in CCofA 6-26-78)
5-18-78		Filed Clerk's letter re service of notice of appeal, w/copy ltr, notice of appeal and d.s.to counsel & CCofA

IN THE UNITED STATES DISTRICT COURT IN AND
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
AUG 19 1977
REX B. HAWKS, CLERK
U. S. DISTRICT COURT

FRED N. WALKER)	
)	
Plaintiff,)	
vs	)	Case No.
	)	CIV-77-0816-T
ARMCO STEEL CORPORATION,)	
A Corporation)	
Defendant.)	

PETITION

COMES now the plaintiff, Fred N. Walker and for his cause of action against the defendant, Armco Steel Corporation, alleges and states the following particulars to wit:

I

That the plaintiff is a resident of the State of Oklahoma. The defendant is a foreign corporation, having its principal place of business in a state other than the state of Oklahoma. The amount in controversy is in excess of \$10,000.00. Since the cause of action herein arose in Oklahoma County, Oklahoma and because the defendant is doing business in this State and can be served with process through its service agent, The Corporation Company, 735 First National Center, Oklahoma City, Oklahoma, the United States District Court for the Western District of Oklahoma has jurisdiction of the parties to and the subject matter for this action.

II

The defendant, at the time of the accident, was engaged in the business of manufacturing, selling and distributing the product, which is the subject matter of this

[APPENDIX]

action, which is known as a sheffield nail. This nail was being pounded into a cement wall. At approximately 9:00 on the morning of August 22, 1975 at 200 N. W. 5th in Oklahoma City, Oklahoma County, Oklahoma, while the plaintiff, who is a carpenter, was pounding the nail into the wall, the nail, in question, contained a defect which caused the head of the nail to shatter and to hit the plaintiff directly in the right eye, causing severe and dramatic injuries and damages to him. The particular acts of negligence and carelessness on the part of the defendant will be hereinafter more fully set forth and enumerated.

III

The plaintiff further alleges and states that the defendant was negligent in one or more of the following particulars:

(a) The defendant made, manufactured, sold and distributed said product into the market in normal and ordinary channels and streams of commerce, when the defendant knew and could reasonably foresee that said product would be used by the intended or foreseeable users of said product without such persons inspecting it for defects and that any such defect would not be discovered by a person such as the plaintiff.

(b) The defendant transferred, sold, distributed and manufactured said product into the channels of commerce in a defective and unreasonably dangerous condition and that it was unsafe and unfit for the use of which it was intended as a nail, at the time they sold and parted with control of said product.

(c) The defendant placed said product into the normal channels of commerce when they knew said product was designed and manufactured and was unreasonably dangerous to an extent beyond that, which would be contemplated by the ordinary consumer purchaser in a community.

[APPENDIX]

(d) The defendant failed to design and impliment an adequate safeguard on said product.

(e) The defendant violated the prevailing customs and usage standards in the nail industry business.

IV

The plaintiff further alleges and states as direct and proximate result of one or more of the foregoing acts of carelessness and negligence on the part of the defendant that the defendant's nail did puncture and wound the plaintiff's eye severely injuring the plaintiff and without this negligence on the part of the defendant this would not have occurred.

V

The plaintiff further alleges and states that plaintiff suffered injury to plaintiff's right eye, causing blindness in that eye. That plaintiff has also suffered due to the negligence of the defendant, traumatic neurosis. That plaintiff sustained profound mental and nervous shock; the plaintiff has severe and protracted headaches, dizziness and instability; that plaintiff's injuries are permanent and progress to plaintiff in the sum of Five Hundred Thousand Dollars (\$500,000.00), for which plaintiff prays judgment against the defendant.

VI

The plaintiff further alleges and states that plaintiff has incurred expenses for medical treatment and drugs for which plaintiff prays judgment. In this connection the plaintiff will incur additional expenses for future medical treatment for all of which plaintiff prays judgment.

VII

The plaintiff further alleges and states that at the time of the plaintiff's injuries here and before set forth the plaintiff was 45 years of age. In this connection, the plain-

[APPENDIX]

tiff has suffered a loss of earning capacity and has therefore been damaged in earning capacity for which the plaintiff prays judgment against the defendant.

WHEREFORE, the plaintiff prays judgment prays judgment on his cause of action against his defendant in the total sum of Five Hundred Thousand Dollars (\$500,000.00), all Court costs incurred herein, and for such other relief as the Court may deem just and proper.

DON MANNERS

(s) *Don Manners*

Attorney for the Plaintiff

1510 North Klein

Oklahoma City, OK 73106

(405) 236-4534

ATTORNEYS LEIN CLAIMED

(s) *Don Manners*

U.S. MARSHALS SERVICE		INSTRUCTIONS: See "INSTRUCTION" FOR SERVICE OF PROCESS BY THE U.S. MARSHAL on the reverse of the last (No. 5) copy of this form. Please type or print legibly, insuring readability of all copies. Do not detach any copies.	
INSTRUCTION AND PROCESS RECORD			
PLAINTIFF	FRED N. WALKER	COURT NUMBER	C-77-08167
DEFENDANT	ARMCO STEEL CORPORATION, A Corporation	TYPE OF WRIT	SUMMONS / C
SERVE NAME OF INDIVIDUAL COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN THE CORPORATION COMPANY			
ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code) 735 First National Center Oklahoma City, Oklahoma 73102			
AT	SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW: DON MANNERS 1510 North Klein Oklahoma City, Oklahoma 73106	Show number of this writ and total number of writs submitted, i.e., 1 of 1, 1 of 3, etc. NO. TOTAL 1 1 OF 1	
SPECIAL INSTRUCTIONS: Personal service on The Corporation Company, named service agent for the defendant, Armco Steel Corporation		CHECK IF APPLICABLE: <input type="checkbox"/> One copy for U. S. Attorney or designee and two copies for Attorney General of the U. S. included. SHOW IN THE SPACE BELOW AND TO THE LEFT ANY SPECIAL INSTRUCTIONS OR OTHER INFORMATION PERTINENT TO SERVING THE WRIT DESCRIBED ABOVE.	
NAME AND SIGNATURE OF ATTORNEY OR OTHER ORIGINATOR By:		TELEPHONE NUMBER (405) 236-4534	DATE August 19, 1977
SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE			
Show amount of deposit for applicable code and sign USM-285 for first writ only if more than one writ submitted. I acknowledge receipt for the total number of writs indicated and for the deposit (if applicable) shown.	DEPOSIT/CODE 	DISTRICT OF ORIGIN TO SERVE Fed. Circle	LOCATION OF SUB-OFFICE OF DIST. TO SERVE
<input checked="" type="checkbox"/> I hereby certify and return that I have personally served, have legal evidence of service, or have executed as shown in "REMARKS," the writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below.	SIGNATURE OF AUTHORIZED USMS DEPUTY OR CLERK [Signature]		DATE 12/1/77
<input type="checkbox"/> I hereby certify and return that, after diligent investigation, I am unable to locate the individual, company, corporation, etc., named above within this Judicial District.			
NAME AND TITLE OF INDIVIDUAL SERVED (if not shown above)			
ADDRESS (Complete only if different than shown above)		DATE OF SERVICE 12/1/77	TIME 7:00 AM
DATE(S) OF ENDEAVOR (Use Remarks if necessary)		SIGNATURE OF U. S. MARSHAL OR DEPUTY [Signature]	
REMARKS		FEE (if applicable) \$ 3.00	MILEAGE \$

INITIAL DEPOSIT: -0-
 COST FOR SERVICE: 3.00
 BALANCE DUE: 3.00

Please make remittance payable to
 U. S. MARSHAL, BOX 886,
 OKLAHOMA CITY, OKLA. 73102

12-5-77

DEC 6 RECD

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

F I L E D

JAN 5 1978

HERBERT T. HOPE, CLERK
U. S. DISTRICT COURT
By Irene Higginbotham, Deputy

FRED N. WALKER,)
Plaintiff,)
vs.) NO: CIV-77-0816-T
ARMCO STEEL CORPORATION,)
Defendant.)

MOTION TO DISMISS

COMES NOW the Defendant, Armco Steel Corporation, and respectfully moves that this Court dismiss the above action, commenced by the Plaintiff herein, Fred N. Walker, for the reason that the service of summons issued in this matter was not served within the time prescribed by law under the Statutes of the State of Oklahoma.

LOONEY, NICHOLS, JOHNSON & HAYES

By (s) *Richard L. Kiersey*

Richard L. Kiersey

219 Couch Drive

Oklahoma City, Oklahoma 73102

ATTORNEYS FOR DEFENDANT

[Certificate of Mailing omitted in printing]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FRED N. WALKER,)
Appellant,)
vs.) No. 77-0016-T
ARMCO STEEL CORPORATION,)
Appellee.)

ORDER

Jurisdiction in this action, for personal injury, is founded upon 28 U.S.C. §1332. Plaintiff's complaint states that he received injuries from defendant's tortious acts on August 22, 1975. Complaint was filed August 19, 1977, three days before the action would have been barred by the Oklahoma statute of limitations. Defendant was served with process on December 1, 1977. Defendant's motion to dismiss presents an essentially simple question which has no concrete answer in this jurisdiction; i.e., when is an action "commenced" in federal court, so as to toll the statute of limitations?

The Oklahoma statute of limitations for tortious injuries is two years. 12 O.S. 1971, § 95. An action is commenced in state court when process issues, provided process is actually served within sixty (60) days after the attempt is made. 12 O.S. 1971, § 97; *Lake v. Leitch*, 550 P.2d 935 (Okl. 1976). Plaintiff admits that had this action been filed in state court and service not made until December 1, it would be barred by the statute of limitation.

In federal court, an action is commenced when the complaint is filed. Rule 3, Federal Rules of Civil Procedure. Until 1965, Rule 3 was construed so as to incorporate the entire state statutory scheme for tolling the statute of limitations into federal procedure. *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949); *Murphy v. Citi-*

[APPENDIX]

zens Bank of Clovis, 244 F.2d 511 (10th Cir. 1957). However, in *Hanna v. Plumer*, 380 U.S. 460 (1965), the Supreme Court, in determining propriety of service, relied on Federal Rule 4d, rather than state law, which was in conflict. The Court in *Hanna* did not overrule *Ragan v. Merchants Transfer & Warehouse Co.*, supra, in fact, *Ragan* was distinguished by the *Hanna* Court at page 469. However, following the *Hanna* decision, the circuits have been in conflict as to whether state law or Federal Rule 3 governs commencement of a suit. The majority rely on *Ragan* and determine commencement of suit by applying state law. *Witherow v. Firestone Tire & Rubber Co.*, 530 F.2d 160 (3rd Cir. 1976); *Anderson v. Papillion*, 445 F.2d 841 (5th Cir. 1971); *Groninger v. Davison*, 364 F.2d 638 (8th Cir. 1966); *Sylvester v. Messler*, 246 F. Supp. 1 (E.D. Mich. 1965), aff'd 351 F.2d 472 (6th Cir. 1965), cert. denied 382 U.S. 1011. See also *Dial v. Ivy*, 370 F. Supp. 833 (W.D. Okl. 1974), where the Court held that the state statute controlled, without commenting on *Hanna*. For the minority view, see *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2nd Cir. 1968).

The Tenth Circuit has withheld decision on this issue. In *Chappell v. Rouch*, 448 F.2d 446 (10th Cir. 1971), the Tenth Circuit was presented with a question of whether Kansas law or the Federal Rules of Civil Procedure governed the commencement of suit so as to toll the Kansas statute of limitations. The trial court had overruled a motion to dismiss, holding that Federal Rule 3 determined when suit was commenced because *Hanna v. Plumer* had "modified *Ragan* to the end that the federal rule, rather than the state statute, controls and fixes the time the action was commenced." (*Chappell* at 448.) The Tenth Circuit commented on the trial court's ruling, stating:

"In our view of the matter, however, *Ragan* is distinguishable on its facts from the instant controversy and though we agree that *Hanna* governs, we need not here come to grips with the intriguing question as to

[APPENDIX]

whether *Hanna* overrules *Ragan*, a matter on which there is considerable differences of judicial thought." *Id* at 448.

The Court went on to distinguish the *Ragan* rule from the facts before it. The Kansas statute relied on by the defendant was not an "integral" part of the Kansas statute of limitations. The Kansas statute defining commencement of actions was in the chapter on civil procedure and was not inextricably intertwined with the statute of limitations. The chapter entitled "Limitation of Actions" had no provision defining when and how commencement of actions would toll the statute of limitations. The Court summarized and concluded as follows:

"The narrow issue now to be resolved is whether we are prepared to hold that K.S.A. 60-203 (defining commencement of suit) is an 'integral part' of K.S.A. 60-501 and 60-513 (4) (statute of limitation). If we do so hold, then *Ragan* would control, assuming *Ragan* has not been modified, if indeed not overruled, by *Hanna*. As indicated, we need not here make that determination as in our view K.S.A. 60-203 is not under the circumstances an integral part of K.S.A. 60-501 and just what the Kansas legislature declared it to be, a statute setting forth a rule of civil procedure. So, it boils down to a determination as to whether a Kansas statute promulgating a rule of civil procedure as to when an action is commenced takes precedence in the federal courts over Fed.R.Civ.P. 3, with which it is in direct conflict. All of which brings into play the rule of *Hanna*." *Chappell*, at 449.

The Oklahoma statute before the Court today is an integral part of the Oklahoma statute of limitations. 12 O.S. 1971, § 97, defining commencement of suit, is codified in the chapter entitled "Limitations of Actions". Section 97 states that "an action shall be deemed commenced, within

[APPENDIX]

the meaning of this article, as to each defendant, at the date of the summons which is served on him . . ." (Emphasis added). The preceding sections in the article define the statute of limitations for various types of injuries. 12 O.S. 1971, §97 is an integral part of the Oklahoma statute of limitations and would bar this suit if *Ragan* is still the law.

Having no express ruling from the Tenth Circuit on the effect of *Ragan* on these facts, this Court is free to treat the question as one of first impression. The Court is persuaded that *Hanna* did not overrule *Ragan*. The United States Supreme Court has not been shy to overrule cases expressly, and the fact the Supreme Court not only did not overrule *Ragan*, but in fact distinguished it, in *Hanna*, persuades this Court that *Ragan* still controls. Even limiting *Ragan* to its facts, dismissal of this suit is required. The Oklahoma definition of commencement of action is an integral part of the Oklahoma statute of limitations. The rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) requires that in diversity cases, litigants in federal court receive no advantages over those in state court. To ignore the Oklahoma statute in question here would give plaintiff greater rights in federal court than he would receive in state court a result not allowed after *Erie*.

Plaintiff's complaint, on its face, is barred by the Oklahoma statute of limitations and the Oklahoma definition of commencement of suit. Accordingly, defendant's Motion to Dismiss is granted, and plaintiff's complaint is, by this order, dismissed.

It is so ordered this 18th day of April, 1978.

(s) *Ralph Thompson*
United States District Judge

[APPENDIX]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1477

FRED N. WALKER,	)	Appeal from
Plaintiff-Appellant,	)	the United States
	)	District Court
v.	)	for the
	)	Western District of
ARMCO STEEL CORPORATION,	)	Oklahoma (D.C.
a corporation,	)	No. 77-0816-T)
Defendant-Appellee.)	

Submitted on the briefs.

Don Manners of Manners, Cathcart & Lawter, Oklahoma City, Oklahoma, for the Plaintiff-Appellant.

Burton J. Johnson and Richard L. Kiersey of Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, for Defendant-Appellee.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is a Calendar C case.

This is a diversity action which raises the question whether Rule 3 of the Federal Rules of Civil Procedure or § 97 of Okla. Stat. title 12 (West Supp. 1978) determines when a case is filed in the Federal Court. Is it a state law or federal question? The underlying problem is whether *Ragan v. Merchants Transfer & Warehouse Co.*,

[APPENDIX]

337 U.S. 530 (1949) or *Hanna v. Plumer*, 380 U.S. 460 (1965) governs.

The United States District Court for the Western District of Oklahoma dismissed the action on the ground that it was outlawed by the statute of limitations in Oklahoma because it had not been filed in accordance with the Oklahoma rule; that although the case was actually filed in time, process was not served within the period of limitations prescribed by the Oklahoma statute. The trial Court reasoned that the Oklahoma filing rule was integrated in the pertinent Oklahoma limitations provision. The trial Court ruled that *Hanna v. Plumer, supra*, did not expressly overrule *Ragan v. Merchants Transfer & Warehouse Co., supra*, and, therefore, the latter case governed.

The facts are these:

Appellant Walker suffered an injury when a nailhead fragmented and hit his right eye, on August 22, 1975, while he was engaged in his work. The suit against Armco Steel Corporation, the manufacturer of the nail, alleges that the nail was defective. The complaint was filed in the Clerk's office of the United States District Court for the Western District of Oklahoma on August 19, 1977. Summons was issued the next day. For reasons which do not appear in the record, process was not served on Armco until December 1, 1977. On January 5, 1978, Armco filed a Motion to Dismiss Plaintiff's complaint asserting that the statute of limitations barred the action. The Motion was granted on April 18, 1978. The date of filing was three days prior to the date that the two-year statute would have barred the action. The issue, as indicated above, is when, if ever, the statute of limitations is tolled.

The Oklahoma statute which was relied on by the trial Court and which is here sought to be applied reads:

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the

[APPENDIX]

date of the summons which is served on him or on a codefendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. At attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons, within sixty (60 days).

Okla. Stat. Ann. tit. 12, § 97 (West Supp. 1978).

The above statute makes provision for faithful and diligent endeavor to procure service if it is carried out within sixty (60 days) of date of issuance, provided the summons is issued within the limitations period. Although the summons here was shown to have been issued on time, the service was not completed within sixty (60 days), nor is there any evidence that there was a diligent attempt to procure service. Therefore, the only hope which the plaintiff-appellant could entertain would be that the federal procedural provision would be ruled applicable.

There is another provision in the Oklahoma compilation, Okla. Stat. Ann. tit. 12, § 151 (West Supp. 1978), which provides that:

A civil action is deemed commenced by filing in the office of the Court Clerk of the proper Court a petition and by the clerk's issuance of summons thereon. Where service by publication is proper, the action shall be deemed commenced at the date notice of publication is signed by the Court Clerk. Where service is sought to be effected by mailing, the action shall be deemed commenced when the envelope containing summons,

[APPENDIX]

addressed to the defendant or to the service agent, if one has been appointed, is deposited in the United States mail with postage prepaid for forwarding by certified mail with a request for a return receipt from addressee only.

There is no indication, however, that this adds anything to § 95 and 97, both of which are construed by the Oklahoma Court of Appeals and the Supreme Court as limitation provisions.

The applicable Federal Rule is free of all of these complications. Rule 3 of the Federal Rules of Civil Procedure simply provides: "A civil action is commenced by filing a complaint with the Court."

The question which we must consider is whether the Oklahoma statute, § 97, must be applied as the trial Court applied it or whether Rule 3 of the Federal Rules of Civil Procedure should have been held to govern. The underlying issue is whether the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) is, consistent with the basic diversity notion that a Federal Court, sitting in diversity cases and administering state law, must apply not only substantive law of the forum state, but procedural law as well if the application of state procedural law changes the outcome of the case.

Unquestionably, § 97, *supra*, (the Oklahoma statute), is in direct conflict with Rule 3 of the Federal Rules of Civil Procedure with respect to what constitutes a filing which will toll the statute of limitations. That the Oklahoma provision is not only a filing provision but a limitations one was well is to be gleaned from the statute as well as the cases. See, for example, *Tyler v. Taylor*, Okl. App., 478 P.2d 1214 (1977), and *State ex rel. Roacher v. Caldwell*, Okl., 522 P.2d 1031 (1974). So even though the Oklahoma statute may be complex and even mysterious as compared with the federal provision in that it obligates the

[APPENDIX]

litigant not only to timely file the case but also to see that process issues and that the adversary is served on time in order to toll the statute of limitations, it is the law of Oklahoma. The fact that the local law appears technical and cumbersome is not a factor to be weighed. The controlling aspect is whether the outcome of the case is changed as a result of applying or not applying the state rule.

In support of the mentioned approach, defendant-appellee urges that the Supreme Court's decision in *Ragan v. Merchants Transfer & Warehouse Co.*, *supra*, which held state law to be applicable in deciding when a case has been filed for purposes of tolling the statute of limitations, governs. *Ragan*, it is to be noted, is a decision which originated in this circuit, and a Kansas statute similar in terms to the Oklahoma statute before us (§ 97, *supra*), was applied in preference to the federal rule on the same subject. As in the present case, the Kansas statute required filing of the complaint, issuance of the summons and service of the summons. All of these were tied to the limitations statute. Indeed this Court upheld the District Court determination that the requirement of service of summons within the statutory limitation "was an integral part of that state's statute of limitations."

Ragan, of course, religiously followed *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). The outcome test was thus held to apply even in this area of pure procedure. The question boils down to whether *Ragan* must be applied here.

The Supreme Court's decision in *Hanna v. Plumer*, *supra*, gave promise that the corner had been turned so to speak, as far as *Guaranty* and *Ragan* continuing to dominate where the question is one of pure procedure such as we have here. *Hanna* construed a Massachusetts statute which had the same kind of complicated statute with respect to mode of service of process as we find here. In

[APPENDIX]

Hanna, as here, the application of the outcome test would have resulted in the state law being applied and in the defendant prevailing. In the opinion which was written by Chief Justice Warren, the outcome determinative test was rejected and the Federal Rules of Civil Procedure were ruled applicable. However, the Court in a footnote distinguished *Ragan* even though *Ragan* had applied the outcome determinative test which the Court was engaged in rejecting at least to the extent that pure procedural questions were being decided. The *Hanna* opinion observed that every procedural variation is in fact outcome determinative. The Court acknowledged that the outcome determinative test would have a marked effect on the outcome of litigation before it. It said, however, that the test was not to be regarded as a talisman. Inasmuch as *Ragan* is based entirely upon the *Guaranty Trust* conception that outcome determinative is the answer, the refusal of the Court to apply this result in the *Hanna* decision is irreconcilable with that in *Ragan*.

We simply point up the dilemma. We do not do so in any spirit of criticism. The present problem is, however, that the Supreme Court in *Hanna*, although it could be said to have shown dissatisfaction with *Ragan*, did not expressly overrule it. Professors Wright and Miller have pointed this out and have noted also that the Supreme Court knows how to overrule a case when it wishes to do so. They further observe that *Ragan* has continued vitality. See 4 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1057 at 190-191 (1969). It is true, however, that although the circuits are divided on the question, the preponderance of the circuits and the district courts within the circuits support the view that *Ragan* continues to be viable.

More recently this Court rendered an opinion which selected Rule 3 of the Federal Rules of Civil Procedure. This was in *Chappell v. Rouch*, 448 F.2d 446 (10th Cir. 1971). This action arose in Kansas as did *Ragan*, but the

[APPENDIX]

statute which was considered in *Ragan* had been modified. The reasoned opinion by Judge McWilliams concluded that *Ragan* was not binding in view of this fact. The Oklahoma statute which we consider, however, is indistinguishable from the statute which was construed in *Ragan*, so even if we were desirous of applying Rule 3, which we are, we are not free to do so. (This writer at least would prefer the federal rule).

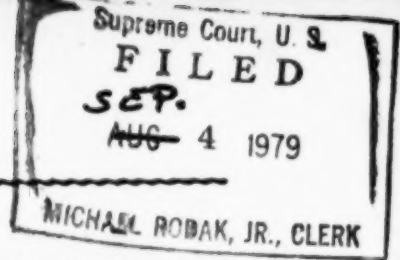
This Court has recently issued its opinion in *Lindsey v. Dayton-Hudson Corp.*, No. 77-1051. The opinion by Judge Logan is extremely well presented and it too adopts the view that *Ragan* continues to be authoritative.

We recognize that decisions are frequently allowed to die on the vine, so to speak. We also recognize that in such instances death does not, as a practical matter, take place. If, however, *Ragan* was intended to die a natural death, it failed to happen.

In the Tenth Circuit we have in addition a judicial administration problem, because since the *Ragan* case originated here it continues to be the law of this circuit. The Tenth Circuit affirmed the trial Court's decision, and the Supreme Court not only affirmed the Tenth Circuit, but lavishly praised the decision as well.

The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between *Ragan* and *Hanna*. So far it has not done so, and until the Supreme Court acts we feel constrained to follow *Ragan*.

Accordingly, the judgment of the District Court is affirmed.



In the Supreme Court of the United States

No. 78-1862

FRED N. WALKER,
Petitioner,

V E R S U S

ARMCO STEEL CORPORATION,
Respondent.

**RESPONSE TO THE PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE TENTH CIRCUIT**

LOONEY, NICHOLS, JOHNSON
& HAYES

By Jay M. Galt

By Richard L. Kiersey

219 Couch Drive

Oklahoma City, Okla. 73102

(405) 235-7641

Counsel for Respondent

September, 1979

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
RESPONDENTS ARGUMENT FOR DENYING A WRIT OF CERTIORARI	3
CONCLUSION	6
APPENDIX A — Order of the U.S. District Court for the Western District of Oklahoma	A-1
APPENDIX B — Opinion of U.S. Court of Appeals for the Tenth Circuit	B-1
APPENDIX C — Brief of Appellee filed in the U.S. Court of Appeals (10th Cir.)	C-1

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. Papillion, 445 F.2d 841 (La., 5th Cir. 1971) _____	4
Groninger v. Davidson, 364 F.2d 638 (Ia., 8th Cir. 1966) _____	4-5
Hanna v. Plumer, 380 U.S. 460 (1965) _____	3, 6
Lake v. Lietch, 550 P.2d 935 (Okl. 1976) _____	3-4
Nichols v. Eli Lilly and Co., 501 F.2d 392 (Okl., 10th Cir. 1974) _____	5
Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530 (1949) _____	3
Silvester v. Messler, 351 F.2d 472 (Mich., 6th Cir. 1965) _____	4
Walker v. ARMCO Steel Corporation, 452 F.Supp. 243 (W.D. Okl. 1978) _____	4
Witherow v. Firestone Tire and Rubber Co., 530 F.2d 160 (Pa., 3rd Cir. 1976) _____	4, 5
Statutes	
12 O.S., 1971, § 97 _____	2, 3, 6
Rules	
Federal Rules of Civil Procedure, Rule 3 _____	2

In the Supreme Court of the United States

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The respondent, ARMCO Steel Corporation would respectfully pray that this Honorable Court deny the Writ of Certiorari and not review the opinion of the Tenth Circuit entered in the proceedings on February 14, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals, 529 F.2d 1133, and the opinion of the United States District Court for the Western District Court of Oklahoma, 542 F.Supp. 243 appear in the Appendix.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 3:

"Commencement of Action — A civil action is commenced by filing a complaint with the Court."

Oklahoma Statutes Annotated, Title 12, Sec. 97 (West Supp. 1978):

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the time of the summons which is served on him or a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to commencement thereof, within the meaning of this article, when the parties faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons within sixty (60 days)."

STATEMENT OF THE CASE

On August 22, 1975, the Petitioner, Fred N. Walker, was injured. On August 19, 1977, the Petitioner filed a complaint in the United States District Court for the Western District of Oklahoma against the Respondent seeking damages for personal injuries alleging a defect in a manufactured product of the Respondent. Summons was also issued on that date. On December 1, 1977, ARMCO Steel Corporation was served with process and on January

5, 1978, the Respondent filed a Motion to Dismiss for the reason that the action was barred by the applicable state statute of limitations. The Honorable Ralph Thompson sustained the Order to Dismiss on April 18, 1978. On February 14, 1979, the United States Court of Appeals for the Tenth Circuit affirmed the decision.

RESPONDENTS ARGUMENT FOR DENYING A WRIT OF CERTIORARI

The decision below by the United States Court of Appeals for the Tenth Circuit properly realized the dichotomy between *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949), and *Hanna v. Plumer*, 380 U.S. 460 (1965), that difference being that the *Hanna* case dealt with the diversity action involving a state statute which made proper service of process upon a decedent's representative complicated and cumbersome. The *Ragan* case, like the present case, dealt with notice to a defendant, timely within the appropriate state statute of limitations. The *Hanna* case dealt with who was the proper party to serve while the *Ragan* case dealt with timely notification of a pending lawsuit. The case at bar is more similar to the *Ragan* case.

12 O.S., 1971, Sec. 97 is within the Chapter of the Oklahoma Statutes Annotated entitled Limitations of Actions. It has been held to be an integral part of the Oklahoma Statutes of Limitations. *Lake v. Lietch*, 550 P.2d 935 (Okl. 1976), the Honorable Ralph Thompson, writing for the District Court in this matter stated:

"The Oklahoma statute before the Court today is an integral part of the Oklahoma Statute of Limita-

tions." 12 O.S., 1971, Sec. 97, defining commencement of suit is codified in the chapter entitled 'Limitation of Actions'. Sec. 97 states that 'an action shall be deemed commenced *within the meaning of this article*, as to each defendant, at the date of summons which is served on him' . . ." (the emphasis is that of Judge Thompson). *Walker v. ARMCO Steel Corporation*, 452 F.Supp. 243 (W.D. Okl. 1978).

Petitioner herein would want the Court to believe that Rule 3 of the Federal Rules of Civil Procedure and 12 O.S., 1971, Sec. 97 are in direct conflict. That is simply not the case. In any action filed, compliance with the applicable statute of limitations is mandatory, if properly raised as a defense. The reason for these statutes is that persons will not have to defend stale claims against them and that the defendant have notice of a pending claim within a period prescribed by the state legislature.

Further, it has been recognized that "(i)n a diversity action in Federal District Court, defense of limitations is governed by the law of the state where the action arises." *Dial v. Ivey*, 370 F.Supp. 833 (W.D. Okl. 1974). It is interesting to note that the case so heavily relied upon by the Petitioner in this action is that of *Hanna v. Plumer*, *supra*, and that case specifically avoided overruling the effect of *Ragan*, *supra*. An examination of the Circuit decisions finds that nearly every one that has faced this question, in a case dealing with the statute of limitations, has followed the rule of *Ragan*. This is seen in the cases of: *Silvester v. Messler*, 351 F.2d 472 (Mich. 1965), 6th Circuit; *Anderson v. Papillion*, 445 F.2d 841 (La. 1971), 5th Circuit; *Witherow v. Firestone Tire and Rubber Co.*, 530 F.2d 160 (Pa. 1976), 3rd Circuit; *Groninger v. Davidson*, 364 F.2d 638

(Ia. 1966), 8th Circuit; and finally in the 10th Circuit, *Nichols v. Eli Lilly and Co.*, 501 F.2d 392 (Okl. 1974). Each and every one of these Circuit decisions were passed upon with the Court fully aware of the decision in *Hanna v. Plumer*, *supra*. In each and every one of these cases, the defendant had no notice of a pending action within the prescribed state statutory scheme. The state scheme is of the utmost importance and this was recognized in the case of *Witherow v. Firestone Tire and Rubber Co.*, *supra*, when Mr. Justice Aldisert stated:

"But certainly a concern for state policies and prerogatives can never be out of place in a system of coordinate sovereignties—as a matter of prudence and comity if not as a matter of constitutional law. Even *Hanna*, while making a vigorous case for the validity of the Federal Rules of Civil Procedure, noted that a Court 'need not wholly blind itself to the degree to which (a federal) rule makes the character and result of the federal litigation stray from the course it would follow in state courts'." (citation omitted)

Further in the opinion:

"While we avoid mechanical application of the 'outcome-determinative' test, or any other signal test, we observe that nothing could be more 'substantial' than to allow an action to proceed in federal court which would be time-barred in the state court." (emphasis added) *Witherow v. Firestone Tire and Rubber Co.*, *supra*.

CONCLUSION

The Respondent would respectfully show this Court that certiorari is not necessary for means of clarification of this issue, nor is it warranted under the facts of this particular case. The United States District Court for the Western District of Oklahoma recognized that 12 O.S., 1971, Sec. 97 is an integral part of the Oklahoma Statute of Limitations and that the Petitioner had not timely prosecuted his action under that statute's direction and that the Petitioner's claim was barred by limitations. The Tenth Circuit upheld that view in its decision. Even being very mindful of the dictates of *Hanna*, the federal courts sitting in a diversity action must not be allowed to lean in a direction which could create confusion between the prosecution of diversity cases which could embody two separate schemes of statutes of limitations within the boundaries of one sovereign state. For the foregoing reasons and with the above cited authority the Respondent respectfully submits that certiorari be denied to the Petitioner and the decision of the United States Court of Appeals for the Tenth Circuit be allowed to stand.

Respectfully submitted,

LOONEY, NICHOLS, JOHNSON
& HAYES

By Jay M. Galt

By Richard L. Kiersey

219 Couch Drive

Oklahoma City, Okla. 73102

(405) 235-7641

Counsel for Respondent

September, 1979

APPENDIX A

[Filed Stamp Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

FRED N. WALKER,

)
)
) Plaintiff)

vs.

) No. CIV-77-0816-T
)

ARMCO STEEL CORPORATION,

)
)
) Defendant)

ORDER

Jurisdiction in this action, for personal injury, is founded upon 28 U.S.C. § 1332. Plaintiff's complaint states that he received injuries from defendant's tortious acts on August 22, 1975. Complaint was filed August 19, 1977, three days before the action would have been barred by the Oklahoma statute of limitations. Defendant was served with process on December 1, 1977. Defendant's motion to dismiss presents an essentially simple question which has no concrete answer in this jurisdiction; i.e., when is an action "commenced" in federal court, so as to toll the statute of limitations?

The Oklahoma statute of limitations for tortious injuries is two years. 12 O.S. 1971, § 95. An action is commenced in state court when process issues, provided process is actually served within sixty (60) days after the attempt is made. 12 O.S. 1971, § 97; *Lake v. Lietch*, 550 P.2d 935 (Okla. 1976). Plaintiff admits that had this action been filed in state court and service not made until December 1, it would be barred by the statute of limitation.

In federal court, an action is commenced when the complaint is filed. Rule 3, Federal Rules of Civil Procedure. Until 1965, Rule 3 was construed so as to incorporate the entire state statutory scheme for tolling the statute of limitations into federal procedure. *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949); *Murphy v. Citizens Bank of Clovis*, 244 F.2d 511 (10th Cir. 1957). However, in *Hanna v. Plumer*, 380 U.S. 460 (1965), the Supreme Court, in determining propriety of service, relied on Federal Rule 4d, rather than state law, which was in conflict. The Court in *Hanna* did not overrule *Ragan v. Merchants Transfer & Warehouse Co.*, *supra*, in fact, *Ragan* was distinguished by the *Hanna* Court at page 469. However, following the *Hanna* decision, the circuits have been in conflict as to whether state law or Federal Rule 3 governs commencement of a suit. The majority rely on *Ragan* and determine commencement of suit by applying state law. *Witherow v. Firestone Tire & Rubber Co.*, 530 F.2d 160 (3rd Cir. 1976); *Anderson v. Papillion*, 445 F.2d 841 (5th Cir. 1971); *Groninger v. Davison*, 364 F.2d 638 (8th Cir. 1966); *Sylvester v. Messler*, 246 F.Supp. 1 (E.D. Mich. 1965), *aff'd* 351 F.2d 472 (6th Cir. 1965), *cert. denied* 382 U.S. 1011. See also *Dial v. Ivy*, 370 F.Supp. 833 (W.D. Okl. 1974), where the Court held that the state statute controlled, without commenting on *Hanna*. For the minority view, see *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2nd Cir. 1968).

The Tenth Circuit has withheld decision on this issue. In *Chappell v. Rouch*, 448 F.2d 446 (10th Cir. 1971), the Tenth Circuit was presented with a question of whether Kansas law or the Federal Rules of Civil Procedure governed the commencement of suit so as to toll the Kansas statute of limitations. The trial court had overruled a motion to dismiss, holding that Federal Rule 3 determined when suit was commenced because *Hanna v. Plumer* had "modified *Ragan* to the end that the federal rule, rather

than the state statute, controls and fixes the time the [action was] commenced." (Chappell at 448.) The Tenth Circuit commented on the trial court's ruling, stating:

"In our view of the matter, however, *Ragan* is distinguishable on its facts from the instant controversy and though we agree that *Hanna* governs, we need not here come to grips with the intriguing question as to whether *Hanna* overrules *Ragan*, a matter on which there is considerable difference of judicial thought." *Id* at 448.

The Court went on to distinguish the *Ragan* rule from the facts before it. The Kansas statute relied on by the defendant was not an "integral" part of the Kansas statute of limitations. The Kansas statute defining commencement of actions was in the chapter on civil procedure and was not inextricably intertwined with the statute of limitations. The chapter entitled "Limitation of Actions" had no provision defining when and how commencement of actions would toll the statute of limitations. The Court summarized and concluded as follows:

"The narrow issue now to be resolved is whether we are prepared to hold that K.S.A. 60-203 [defining commencement of suit] is an 'integral part' of K.S.A. 60-501 and 60-513(4) [statutes of limitation]. If we do so hold, then *Ragan* would control, assuming *Ragan* has not been modified, if indeed not overruled, by *Hanna*. As indicated, we need not here make that determination as in our view K.S.A. 60-203 is not under the circumstances an integral part of K.S.A. 60-501 and K.S.A. 60-513(4). . . . Rather, K.S.A. 60-203 is just what the Kansas legislature declared it to be, a statute setting forth a rule of civil procedure. So, it boils down to a determination as to whether a Kansas statute promulgating a rule of civil procedure as to when an action is commenced takes precedence in the

[APPENDIX]

federal courts over Fed.R.Civ.P. 3, with which it is in direct conflict. All of which brings into play the rule of *Hanna*." *Chappell*, at 449.

The Oklahoma statute before the Court today is an integral part of the Oklahoma statute of limitations. 12 O.S. 1971, § 97, defining commencement of suit, is codified in the chapter entitled "Limitation of Actions". Section 97 states that "an action shall be deemed commenced, *within the meaning of this article*, as to each defendant, at the date of the summons which is served on him . . ." (emphasis added). The preceding sections in the article define the statute of limitations for various types of injuries. 12 O.S. 1971, § 97 is an integral part of the Oklahoma statute of limitations and would bar this suit if *Ragan* is still the law.

Having no express ruling from the Tenth Circuit on the effect of *Ragan* on these facts, this Court is free to treat the question as one of first impression. The Court is persuaded that *Hanna* did not overrule *Ragan*. The United States Supreme Court has not been shy to overrule cases expressly, and the fact the Supreme Court not only did not overrule *Ragan*, but in fact *distinguished* it, in *Hanna*, persuades this Court that *Ragan* still controls. Even limiting *Ragan* to its facts, dismissal of this suit is required. The Oklahoma definition of commencement of actions is an integral part of the Oklahoma statute of limitations. The rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) requires that in diversity cases, litigants in federal court receive no advantages over those in state court. To ignore the Oklahoma statute in question here would give plaintiff greater rights in federal court than he would receive in state court, a result not allowed after *Erie*.

Plaintiff's complaint, on its face, is barred by the Oklahoma statute of limitations and the Oklahoma definition

[APPENDIX]

of commencement of suit. Accordingly, defendant's Motion to Dismiss is granted, and plaintiff's complaint is, by this order, dismissed.

It is so ordered this 18th day of April, 1978.

(s) RALPH G. THOMPSON
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED IN CIVIL DOCKET ON
APR 18 1978

APPENDIX B

PUBLISH

[Filed Stamp Omitted]

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 78-1477

FRED N. WALKER,	)	Appeal from the
	)	United States
Plaintiff-Appellant	)	District Court
v.	)	for the
	)	Western District
ARMCO STEEL CORPORATION,	)	of Oklahoma
	)	(D.C. No.
Defendant-Appellee	)	77-0816-T)

Submitted on the briefs.

Don Manners of Manners, Cathcart & Lawter, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

Burton J. Johnson and Richard L. Keirsey of Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, for Defendant-Appellee.

Before McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is a Calendar C case.

This is a diversity action which raises the question whether Rule 3 of the Federal Rules of Civil Procedure or § 97 of Okla. Stat. title 12 (West Supp. 1978) determines

[APPENDIX]

when a case is filed in the federal court. Is it a state law or federal question? The underlying problem is whether *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) or *Hanna v. Plumer*, 380 U.S. 460 (1965) governs.

The United States District Court for the Western District of Oklahoma dismissed the action on the ground that it was outlawed by the statute of limitations in Oklahoma because it had not been filed in accordance with the Oklahoma rule; that although the case was actually filed in time, process was not served within the period of limitations prescribed by the Oklahoma statute. The trial court reasoned that the Oklahoma filing rule was integrated in the pertinent Oklahoma limitations provision. The trial court ruled that *Hanna v. Plumer*, *supra*, did not expressly overrule *Ragan v. Merchants Transfer & Warehouse Co.*, *supra*, and, therefore, the latter case governed.

The facts are these:

Appellant Walker suffered an injury when a nailhead fragmented and hit his right eye, on August 22, 1975, while he was engaged in his work. The suit against Armco Steel Corporation, the manufacturer of the nail, alleges that the nail was defective. The complaint was filed in the Clerk's office of the United States District Court for the Western District of Oklahoma on August 19, 1977. Summons was issued the next day. For reasons which do not appear in the record, process was not served on Armco until December 1, 1977. On January 5, 1978, Armco filed a motion to dismiss plaintiff's complaint asserting that the statute of limitations barred the action. The motion was granted on April 18, 1978. The date of filing was three days prior to the date that the two-year statute would have barred the action. The issue, as indicated above, is when, if ever, the statute of limitations is tolled.

The Oklahoma statute which was relied on by the trial court and which is here sought to be applied reads:

[APPENDIX]

An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a codefendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons, within sixty (60 days).

Okla. Stat. Ann. tit. 12, § 97 (West Supp. 1978).

The above statute makes provision for faithful and diligent endeavor to procure service if it is carried out within 60 days of date of issuance, provided the summons is issued within the limitations period. Although the summons here was shown to have issued on time, the service was not completed within 60 days, nor is there any evidence that there was a diligent attempt to procure service. Therefore, the only hope which the plaintiff-appellant could entertain would be that the federal procedural provision would be ruled applicable.

There is another provision in the Oklahoma compilation, Okla. Stat. Ann. tit. 12, § 151 (West Supp. 1978), which provides that:

A civil action is deemed commenced by filing in the office of the court clerk of the proper court a petition and by the clerk's issuance of summons thereon. Where service by publication is proper, the action shall be deemed commenced at the date notice of publication is signed by the court clerk. Where service

[APPENDIX]

is sought to be effected by mailing, the action shall be deemed commenced when the envelope containing summons, addressed to the defendant or to the service agent if one has been appointed, is deposited in the United States mail with postage prepaid for forwarding by certified mail with a request for a return receipt from addressee only.

There is no indication, however, that this adds anything to §§ 95 and 97, both of which are construed by the Oklahoma Court of Appeals and the Supreme Court as limitation provisions.

The applicable Federal Rule is free of all of these complications. Rule 3 of the Federal Rules of Civil Procedure simply provides: "A civil action is commenced by filing a complaint with the court."

The question which we must consider is whether the Oklahoma statute, § 97, must be applied as the trial court applied it or whether Rule 3 of the Federal Rules of Civil Procedure should have been held to govern. The underlying issue is whether the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) is, consistent with the basic diversity notion that a federal court, sitting in diversity cases and administering state law, must apply not only substantive law of the forum state, but procedural law as well if the application of state procedural law changes the outcome of the case.

Unquestionably, § 97, *supra* (the Oklahoma statute, is in direct conflict with Rule 3 of the Federal Rules of Civil Procedure with respect to what constitutes a filing which will toll the statute of limitations. That the Oklahoma provision is not only a filing provision but a limitations one as well is to be gleaned from the statute as well as the cases. See, for example, *Tyler v. Taylor*, Okl.App., 578 P.2d 1214 (1977), and *State ex rel. Roacher v. Caldwell*, Okl., 522 P.2d 1031 (1974). So even though the Oklahoma

[APPENDIX]

statute may be complex and even mysterious as compared with the federal provision in that it obligates the litigant not only to timely file the case but also to see that process issues and that the adversary is served on time in order to toll the statute of limitations, it is the law of Oklahoma. The fact that the local law appears technical and cumbersome is not a factor to be weighed. The controlling aspect is whether the outcome of the case is changed as a result of applying or not applying the state rule.

In support of the mentioned approach, defendant-appellee urges that the Supreme Court's decision in *Ragan v. Merchants Transfer & Warehouse Co.*, *supra*, which held state law to be applicable in deciding when a case has been filed for purposes of tolling the statute of limitations, governs. *Ragan*, it is to be noted, is a decision which originated in this circuit, and a Kansas statute similar in terms to the Oklahoma statute before us (§ 97, *supra*), was applied in preference to the federal rule on the same subject. As in the present case, the Kansas statute required filing of the complaint, issuance of the summons and service of the summons. All of these were tied to the limitations statute. Indeed this court upheld the district court determination that the requirement of service of summons within the statutory limitation "was an integral part of that state's statute of limitations."

Ragan, of course, religiously followed *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). The outcome test was thus held to apply even in this area of pure procedure. The question boils down to whether *Ragan* must be applied here.

The Supreme Court's decision in *Hanna v. Plumer*, *supra*, gave promise that the corner had been turned, so to speak, as far as *Guaranty* and *Ragan* continuing to dominate where the question is one of pure procedure such as we have here. *Hanna* construed a Massachusetts statute which had the same kind of complicated statute with re-

[APPENDIX]

spect to mode of service of process as we find here. In *Hanna*, as here, the application of the outcome test would have resulted in the state law being applied and in the defendant prevailing. In the opinion which was written by Chief Justice Warren, the outcome determinative test was rejected and the Federal Rules of Civil Procedure were ruled applicable. However, the Court in a footnote distinguished *Ragan* even though *Ragan* had applied the outcome determinative test which the Court was engaged in rejecting at least to the extent that pure procedural questions were being decided. The *Hanna* opinion observed that every procedural variation is in fact outcome determinative. The Court acknowledged that the outcome determinative test would have a marked effect on the outcome of litigation before it. It said, however, that the test was not to be regarded as a talisman. Inasmuch as *Ragan* is based entirely upon the *Guaranty Trust* conception that outcome determinative is the answer, the refusal of the Court to apply this result in the *Hanna* decision is irreconcilable with that in *Ragan*.

We simply point up the dilemma. We do not do so in any spirit of criticism. The present problem is, however, that the Supreme Court in *Hanna*, although it could be said to have shown dissatisfaction with *Ragan*, did not expressly overrule it. Professors Wright and Miller have pointed this out and have noted also that the Supreme Court knows how to overrule a case when it wishes to do so. They further observe that *Ragan* has continued vitality. See 4 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1057 at 190-191 (1969). It is true, however, that although the circuits are divided on the question, the preponderance of the circuits and the district courts within the circuits support the view that *Ragan* continues to be viable.

More recently this court rendered an opinion which selected Rule 3 of the Federal Rules of Civil Procedure. This was in *Chappell v. Rouch*, 448 F.2d 446 (10th Cir.

[APPENDIX]

1971). This action arose in Kansas as did *Ragan*, but the statute which was considered in *Ragan* had been modified. The reasoned opinion by Judge McWilliams concluded that *Ragan* was not binding in view of this fact. The Oklahoma statute which we consider, however, is indistinguishable from the statute which was construed in *Ragan*, so even if we were desirous of applying Rule 3, which we are, we are not free to do so. (This writer at least would prefer the federal rule.)

This court has recently issued its opinion in *Lindsey v. Dayton-Hudson Corp.*, No. 77-1051. The opinion by Judge Logan is extremely well presented and it too adopts the view that *Ragan* continues to be authoritative.

We recognize that decisions are frequently allowed to die on the vine, so to speak. We also recognize that in such instances death does not, as a practical matter, take place. If, however, *Ragan* was intended to die a natural death, it failed to happen.

In the Tenth Circuit we have in addition a judicial administration problem, because since the *Ragan* case originated here it continues to be the law of this circuit. The Tenth Circuit affirmed the trial court's decision, and the Supreme Court not only affirmed the Tenth Circuit, but lavishly praised the decision as well.

The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between *Ragan* and *Hanna*. So far it has not done so, and until the Supreme Court acts we feel constrained to follow *Ragan*.

Accordingly, the judgment of the district court is affirmed.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

FRED N. WALKER,)	
)	
Appellant,)	
)	
vs.	)	NO. 78-1477
)	
ARMCO STEEL CORPORATION,)	
)	
Appellee.)	

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
STATE OF OKLAHOMA**

BRIEF OF APPELLEE ARMCO STEEL CORPORATION

This case involves an appeal from the lower Court decision of the United States District Court for the Western District of Oklahoma in which the Plaintiff's action was dismissed by the Honorable Ralph G. Thompson, District Judge. The Plaintiff, Fred N. Walker, has appealed that decision to this Court. Jurisdiction in this case was based upon the diversity of citizenship of the Plaintiff and the Defendant; there was no dispute as to the jurisdictional amount in question. The Complaint was filed in the lower Court on August 19, 1977 based upon a cause of action for injury which arose on August 22, 1975. There is no dispute that the applicable Statute of Limitations is two years, under 12 O.S. 1971, Section 95. Summons was issued on August 19, 1977, but was not served until December 3, 1977. The reason for the delay in the service has not been explained, but, in fact, the service agent of the Defendant,

[APPENDIX]

properly registered with the Secretary of State of the State of Oklahoma and properly listed upon the Summons issued by the Plaintiff, is located within a matter of blocks from the office of the Court Clerk of the United States District Court for the Western District of Oklahoma.

PROPOSITION ONE

STATE STATUTES OF LIMITATIONS ARE SUBSTANTIVE TO BE FOLLOWED BY FEDERAL DISTRICT COURTS IN DIVERSITY CASES.

A long and well understood rule that State Statutes of Limitations, more specifically the Oklahoma Statutes of Limitations, 12 O.S. 1971, Section 91 et seq., are substantive law and to be followed in the Federal District Courts in which the particular Court sits. *Ragan vs. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. (1949); in Oklahoma: *Nichols vs. Eli Lillie Co.*, 501 F.2d 392 (1974); *Dial vs. Ivy*, 370 F.Supp. 833 (E.D. Okl. 1974). The Federal Courts, including this Court, have gone further still in saying that the State Court decisions construing the applicable Statutes of Limitations are controlling upon a Federal Court in diversity cases. This is true of all state substantive law and follows the line of cases beginning with *Erie Railroad Company vs. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). In fact, this Court has made such a determination of the Oklahoma Statutes of Limitations in the case of *Nichols vs. Eli Lillie Co.*, (supra). This Honorable Court said in that decision curtly:

"The Oklahoma decisions are controlling". (Referring to the Oklahoma Statutes of Limitations. 12 O.S. 1971, Section 91 et seq.)

[APPENDIX]

PROPOSITION TWO

12 O.S. 1971, SECTION 91 IS AN INTERGAL PART OF THE OKLAHOMA STATUTES OF LIMITATIONS AND IS SUBSTANTIVE LAW TO BE APPLIED BY THE FEDERAL COURTS IN DIVERSITY CASES.

The Statutes of Limitations of the State of Oklahoma are located in Chapter 3 of the Civil Procedure Title of the Oklahoma Statutes, more particularly 12 O.S. 1971, Section 91 et seq. Within that Chapter, defining the limitations of actions, is found 12 O.S. 1971, Section 97. It states, in pertinent part:

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a co-defendant, who is a joint contractor or otherwise united in interest with him. For service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure service that such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons within sixty (60) days." 12 O.S. 1971, Section 97.

The Oklahoma Supreme Court has held that the above quoted Section is part of the Statutes of Limitations, and not merely a service provision. In the case of *Lake vs. Lietch*, 550 P.2d 935 (Okl. 1976), the Oklahoma Supreme Court stated in construing a service statute, 12 O.S. 1971, Section 154.5, which is conflicting with 12 O.S. 1971, Section 97:

"There were no statute of limitations at common law; they are creatures of statutes. Statutory exceptions should be strictly construed and cannot be enlarged from the consideration of inconvenience."

"It was not the intent of the legislature in this inaction (12 O.S. 1971, Section 154.5) to circumvent the statute of limitations entirely."

Plaintiff has admitted that had this action been brought in State Court and service not made until December 1st, it would have been barred by the Statutes of Limitations enacted by the Oklahoma Legislature.

It is important to note that the Oklahoma Supreme Court in the case of *Lake vs. Lietch*, (supra) treated 12 O.S. 1971, Section 154.5. The latter cited Statute is in Chapter 6 of Title 12 of the Oklahoma Statutes. That Chapter primarily deals with the methods and mechanics by which service is procured, i.e. publication, personal service, substitute service. Judge Thompson in his Order in this case also recognized that the Supreme Court has dealt with 12 O.S. 1971, Section 97 as a Statute of Limitations provision and stated:

"The Oklahoma Statute before the Court today is an intergal part of the Oklahoma Statute of Limitations. 12 O.S. 1971, Section 97, defining commencement of suit, is codified in the Chapter entitled 'Limitation of Actions'. Section 97 states that 'an action shall be deemed commenced *within the meaning of this article*, as to each defendant, at the date of summons which is served on him . . ." (The Emphasis is that of Judge Thompson). *Walker vs. Armco Steel Corporation*, 452 F.Supp. 243 (W.D. Okl. 1978).

The District Judges of the United States District Court for the Western District of Oklahoma are required to deal daily, in diversity cases, with the substantive law, both

statutory and case law, of Oklahoma. This includes construing the Oklahoma Statutes of Limitations. These District Judges are knowledgeable and experienced in dealing with Oklahoma law and this Court has stated, on many occasions, that great deference should be afforded a District Court Judge's interpretation of the state law of the state within which he sits. *Vaughn vs. Chrysler Corporation*, 442 F.2d 619, certiorari denied 404 U.S. 857, 92 S.Ct. 106, 30 L.Ed. 2d 98 (10th Cir. Okl. 1971). *Buzzi vs. Hocker*, 370 F.2d 533 (10th Cir. Okl. 1966). *Soloman vs. Downtowner of Tulsa, Inc.*, 357 F.2d 449 (10th Cir. Okl. 1966). This is not meant to infer that Oklahoma is unique, but the above stated rule applies uniformly across the United States, in that United States Courts of Appeal recognize the fact that United States District Judges sitting in the several states are in a position, better than they, to interpret their local state law because of their constant and daily exposure in diversity cases.

PROPOSITION THREE

12 O.S. 1971, SECTION 97 IS NOT IN DIRECT CONFLICT WITH RULE 3, BUT MERELY QUALIFIES IT UNDER THE OKLAHOMA STATUTES OF LIMITATIONS

The Appellant has urged this Court to make a decision that Rule 3 and Section 97 are in direct conflict. This is simply not the case upon a close examination. There is no doubt that if the Plaintiff had obtained service within sixty (60) days the lawsuit would have been timely commenced. However, just as if they had filed the Complaint late, failing to obtain proper service within sixty (60) days is in non-compliance with the Oklahoma Statutes of Limitations.

Further, they have suggested that a ruling in the Appellee's favor would be cumbersome upon the Federal Courts, in that they would have to examine a state statutory scheme before a decision could be reached in diversity

cases. Each and every time an action is commenced one of the first points of concern to the litigants is any limitation of action. The Statute here is clear and the decisions under it uncomplicated. This is not a matter as who is served, nor by which method, such as publication, substitute service, constructive service or public notice. Rule 97 is not a "housekeeping rule" but a substantive limitation of action as defined by the Oklahoma Supreme Court.

The United States Court of Appeals for the Sixth Circuit stated in short fashion, that in issues dealing with the tolling of Statutes of Limitations that *Ragan* controls and *Hanna* does not, pointing out that the Supreme Court carefully refrained from overruling *Ragan*. *Sylvester vs. Messler*, 246 F.Supp. 1 (E.D. Mich. 1965), affirmed 351 F.2d 472 (6th Cir. 1965), cert. denied 382 U.S. 1011, 86 S.Ct. 619 15 L.Ed. 2d 526. District Judge Kaess, in *Sylvester* (supra) quoted the Michigan Statute, similar to the Oklahoma Statute, and stated that, under Michigan law in diversity actions, the State Statute would apply, citing *Ragan*. The Eighth Circuit cited *Sylvester vs. Messler*, (supra) in ruling on an Iowa Statute by stating:

"We nevertheless must conclude that the majority of the Supreme Court, in supporting the opinion written by the Chief Justice, felt that it (referring to *Hanna*) was not an overruling of *Ragan*. Until the Supreme Court itself overrules its very positive statement in *Ragan*, the lower Courts must follow its holdings." *Groninger vs. Davidson*, 364 F.2d 638 (8th Cir. 1966).

The United States Court of Appeals for the Fifth Circuit has also continued to distinguish *Hanna* and *Ragan* and cited *Sylvester vs. Messler*, (supra), by holding that a Louisiana Statute would have barred recovery by the Plaintiff, had the action been brought in State Court, and sustained a lower Federal Court's ruling dismissing the action. *Anderson vs. Papillion*, 445 F.2d 841 (5th Cir. 1971).

It is even the view of prominent commentators that *Ragan* is still good law and proper for precedent in like cases:

"*Ragan* and similar cases may still be read as holding that Rule 3 does not determine or measure the point at which certain state-created rights are extinguished and that this conclusion is unaffected by *Hanna*."

It would be well to remember that the Supreme Court knows how to overrule past decisions when it wishes to do so, and it has not felt inexorably bound by stare decisis on matters of procedure. The Court did not overrule *Ragan* in *Hanna* nor did it hold that in Massachusetts mere filing under Rule 3 was sufficient to commence the action and thereby toll the statute of limitations; on the contrary, it upheld the need for service of process as required by Massachusetts law. Inasmuch as the Court did not overrule *Ragan* but took pains to indicate why *Hanna* was not inconsistent with the earlier case, it seems the safer course to assume that the *Ragan* decision is still authoritative." C. Wright, A. Miller, and E. Cooper, 13 *Federal Practice and Procedure*, Section 3601 (1975) (Footnotes omitted).

Judge Thompson, in the lower Court's decision in this matter, specifically recognized that were this case a matter of how service was procured technically, the Federal Rules of Civil Procedure would apply, however, had this action been brought in State Court the Plaintiff's action would have been dismissed, because the Statutes of Limitations had run pursuant to 12 O.S. 1971, Section 97. Probably the most probing opinion on matters of this kind is the opinion written in *Witherow vs. Firestone & Rubber Co.*, 530 F.2d 160 (3rd Cir. 1976). In that opinion, Justice Aldisert aptly stated that:

"The nub of the policies that underlies *Erie Railroad Company vs. Tompkins* is that for the same transaction the accident of a suit by non-resident litigant at a Federal Court instead of a State Court a block away, should not lead to a substantially different result."

"While we avoid mechanical application of the 'outcome determinative' test, or any other single test, we observe that nothing could be more 'substantial' than to allow an action to proceed in Federal Court *which would be time barred in the State Court.*" (Emphasis Added) *Witherow vs. Firestone Tire & Rubber* (supra).

CONCLUSION

The Appellant seeks relief in this Court in a manner in which the District Court Judge dismissed the action for failure to timely commence his action against Appellee, Defendant below. He would urge to this Court that the time of service is only a technical rule of service and should be judged by Rule 3 of the Federal Rules of Civil Procedure. As stated before all Statutes of Limitations are statutory and not creatures of the common law; they are to be strictly construed and the Oklahoma Statute in question, by its own language, is a limitation upon the time within which an action may be brought against a Defendant in the State of Oklahoma. By the Appellee's own admission, this claim would have been barred before the State Courts, not for a technicality but for the time in which it was done. All Statutes of Limitations necessarily have to deal with the timeliness within which an action may be brought.

The Oklahoma Statute in question has been given strict construction by the Oklahoma Supreme Court, in the cases cited above, and Judge Thompson, in recognizing this judicial interpretation, has held the Plaintiff to the

same standards in Federal Court as that which he would be held in the State Court. Other United States Courts of Appeal have recognized the fact that the Federal Rules must defer to the express State Statutes when the Statutes of Limitations are involved with the timeliness of the service of process. It is the position of the Appellant, supported by the sound reasoning of other circuits, that urges that this Court affirm the lower Court's dismissal of the Plaintiff's action, in that the Defendant should be afforded the same substantive rights as to when he may be sued, when service may be had upon him, and when an action is prosecuted against him, notwithstanding which side of the street and in what court house the action is brought.

Respectfully submitted,

LOONEY, NICHOLS, JOHNSON & HAYES

By (s) Richard L. Keirsey

Richard L. Keirsey

219 Couch Drive

Oklahoma City, Oklahoma 73102

CERTIFICATE OF MAILING

On this 20th day of September, 1978, a true and correct copy of the above and foregoing Brief was mailed to: Mr. Don Manners, of Manners, Cathcart & Lawter, 1510 North Klein, Oklahoma City, Oklahoma 73106, attorneys for Appellant.

Supreme Court, U. S.

FILED

NOV 14 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit**

BRIEF OF PETITIONER

MANNERS, CATHCART & LAWTER
By DON MANNERS
1510 North Klein
Oklahoma City, Oklahoma 73106
Counsel for Petitioner

November, 1979

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
APPLICABLE STATUTORY PROVISIONS	2
QUESTION PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	12
CERTIFICATE OF SERVICE follows Brief.	

TABLE OF AUTHORITIES

Cases

Alford v. Whitsel, 52 F.R.D. 327 (N.D. Miss., 1971)	8
Anderson v. Papillion, 445 F.2d 841 (5th Cir., 1971)	10
Erie v. Tompkins, 304 U.S. 64 (1938)	4
Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962)	11
Grabowski v. United States, 294 F.Supp. 421 (D. Wyo., 1968)	7-8
Groninger v. Davison, 364 F.2d 638 (8th Cir., 1966)	10
Guaranty Trust Company of New York v. York, 326 U.S. 99 (1945)	4

AUTHORITIES CONTINUED	PAGE
Hanna v. Plumer, 380 U.S. 460 (1965)	5, 6, 7, 10-11
Ingram v. Kumar, 585 F.2d 566 (2d Cir., 1978)	9
Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759 (5th Cir., 1963)	11-12
Manatee Cablevision Corp. v. Pierson, 433 F.Supp. 571 (D. D.C., 1977)	9
McCrea v. General Motors Corp., 53 F.R.D. 384 (D. Mont., 1971)	8
Newhart v. George F. Hellick Coffee Company, 325 F.Supp. 1047 (E.D. Pa., 1971)	8-9
Newman v. Freeman, 262 F.Supp. 106 (E.D. Pa., 1966)	9
Prashar v. Volkswagen of America, Inc., 480 F.2d 947 (8th Cir., 1973)	9
Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530 (1949)	3, 4, 5
Smith v. Peters, 428 F.2d 799 (6th Cir., 1973)	7
Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir., 1968)	6, 7
Wheeler v. Standard Tool & Manufacturing Co., 311 F.Supp. 1177 (S.D. N.Y., 1970)	8
Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160 (3rd Cir., 1976)	10
Statutes	
28 U.S.C. 1254(1)	2
Oklahoma Statutes Annotated, Title 12, Section 97 (West Supp., 1978)	2
Rules	
Rule 3, Federal Rules of Civil Procedure	3

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, 529 F.2d 1133, appears at page A-11 of the Appendix. The opinion of the United States District Court for the Western District of Oklahoma, 452 F.Supp. 243, appears at page A-7 of the Appendix.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment in this case on February 14, 1979. Application for Extension of Time to File a Petition for Writ of Certiorari was granted on May 16, 1979, extending the time to June 14, 1979. The Petition for Writ of Cer-

triorari was timely filed on June 14, 1979. This Court granted certiorari on October 1, 1979, invoking jurisdiction under 28 U.S.C. 1254(1).

APPLICABLE STATUTORY PROVISIONS

Federal Rules of Civil Procedure, Rule 3, Commencement of Action: "A civil action is commenced by filing a Complaint with the Court."

Oklahoma Statutes Annotated, Title 12, Section 97 (West Supp. 1978): "An action shall be deemed commenced, within the meaning of this Article, as to each defendant, at the date of the summons which is served on him or a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to commencement thereof, within the meaning of this Article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons within sixty (60) days."

QUESTION PRESENTED FOR REVIEW

In a diversity action, should a federal district court follow Rule 3 of the Federal Rules of Civil Procedure or State law, in determining when an action is commenced for the purpose of tolling a statute of limitations?

STATEMENT OF THE CASE

Petitioner was seriously injured on August 22, 1975, when a nail head fragment lacerated his right eye. This particular nail, manufactured by respondent, shattered while petitioner was trying to drive it into a cement wall. As a result of the accident, petitioner, pursuant to Rule 3 of the Federal Rules of Civil Procedure, commenced a lawsuit by filing the Complaint on August 19, 1977, in the United States District Court for the Western District of Oklahoma.

On December 1, 1977, respondent was properly served with process, and on January 5, 1978, respondent filed a Motion to Dismiss plaintiff's complaint for the reason that the Statute of Limitations barred the action.

Respondent's Motion to Dismiss was sustained by United States District Court Judge Ralph Thompson on April 18, 1978. On February 14, 1979, the United States Court of Appeals for the Tenth Circuit affirmed the decision, basing its ruling on the holding in the case of *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949). The Supreme Court of the United States, on October 14, 1979, granted certiorari.

SUMMARY OF ARGUMENT

In a diversity action, a federal district court should follow Rule 3 of the Federal Rules of Civil Procedure, rather than state law, in determining when an action is commenced for the purpose of tolling the statute of limitations.

ARGUMENT

This case is the latest in a line of cases in which the Supreme Court of the United States has been asked to decide whether federal or state law should be applied by a federal court in an action based on diversity of citizenship. The line of cases began in 1938 in *Erie v. Tompkins*, 304 U.S. 64. In *Erie*, the Court gave the broad command that federal courts are to apply state substantive law and federal procedural law.

Subsequent cases clarified the distinction between procedure and substance. *Guaranty Trust Company of New York v. York*, 326 U.S. 99, made it clear that problems encountered in *Erie*-type cases were not to be resolved using any traditional dichotomy of substance and procedure.

"And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is * * * does it significantly affect the result of a litigation for a federal Court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?" 326 U.S., at 109.

In 1949, this Court was faced with a direct confrontation between the Federal Rules of Civil Procedure and a state statute in *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530. *Ragan* involved a diversity action that had been brought to recover damages for personal injuries occurring in the State of Kansas. The Complaint had been filed within the applicable statute of limitations under Kansas law. However, the summons was not served on the defendant until after the time period had

expired. The Kansas statute of limitations, much like the Oklahoma statute being construed in the case at bar, provided that an action would be deemed commenced at the time the summons was served. The Supreme Court held that even though the plaintiff had complied with Rule 3 of the Federal Rules, the action was nevertheless barred. The Court reasoned that:

"Where local law qualifies or abridges it, the Federal Court must follow suit. Otherwise there is a different measure of the cause of action in one Court than in the other, and the principle of *Erie v. Tompkins* is transgressed." 337 U.S., at 533.

Sixteen years later in *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court was faced with a direct conflict between Rule 4(d)(1) of the Federal Rules of Civil Procedure and a state law governing service of process. In *Hanna*, a diversity suit had been timely filed in a Massachusetts Federal District Court. Service of process was made pursuant to Rule 4(d)(1) by leaving copies of the summons and Complaint with a defendant's wife at his residence. The defendant asked the court to dismiss the action because the service of process was contrary to state law which required "in hand" delivery of the summons to the defendant. The District Court relied on *Ragan* and granted Summary Judgment to the defendant. The Supreme Court of the United States reversed, and this time the Court did not apply the state law. The Supreme Court held that the adequacy of service should have been determined by applying the Federal Rule. The Court stated that:

". . . The adoption of Rule 4(d)(1) designed to control service of process in diversity actions, neither

exceeded the Congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Rule is therefore the standard against which the District Court should have measured the adequacy of the service . . ."

Chief Justice Warren, in the *Hanna* opinion, wrote:

"(I)t cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were created to serve another purpose altogether. To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing State-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." 380 U.S., at 473-474.

For almost two decades now, the validity of the *Ragan* decision has been questioned by Federal Courts across the land. Did the Supreme Court overrule *Ragan* by holding in *Hanna* that a Federal Rule, rather than any contrary State provision, should be applied if valid and in point? That question remains a matter of conflict and hopefully will be resolved by the Court in the case at bar. Some courts have held that *Hanna* overruled the *Ragan* rule while others have continued to apply *Ragan* as good law.

The former view was adopted by the Court of Appeals for the Second Circuit in *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598 (2d Cir. 1968). In that case, the court had to determine which definition of commencement applied. If the principles of *Ragan* were followed the court would have been forced to hold that the State definition of commencement was applicable and, as a result, the action was barred. The District Court held that *Hanna* overruled

Ragan and that the action was commenced within the period of limitations under Rule 3. The Second Circuit affirmed the lower opinion and refuted any notion that the application of Rule 3 would result in forum shopping and any inequitable administration of the law. The court said:

"Application of Rule 3, rather than the New York rule, will not so change the character or result of the litigation as unfairly to discriminate against citizens of New York. While the actual outcome of litigation may in a few instances, as here, be different, it is clear that the character of the litigation will not be greatly changed . . ." 398 F.2d at 606.

The Sixth Circuit has also held that *Ragan* was overruled by *Hanna*. In *Smith v. Peters*, 482 F.2d 799 (6th Cir., 1973), the court held that, "The District Court erred in holding that the manner of commencement of an action in the Federal Courts is an outcome determinative question which a Federal Court, under *Erie R.R. v. Tompkins*, supra, is required to determine under state, rather than federal law. . . . It is purely procedural, and does not relate to the substantive issues of the case. . . . This question, however, was set to rest by the Supreme Court in *Hanna v. Plumer*." 482 F.2d, at 801.

In *Grabowski v. United States*, 294 F.Supp. 421 (D. Wyo. 1968), the court held that Rule 3, rather than the Wyoming Rules of Civil Procedure, determined when an action for wrongful death commenced.

"Under the rule of *Hanna v. Plumer* . . . the Federal Rule is the standard against which the District Court must determine when the action commenced. While the case of *Hanna v. Plumer* does not expressly

overrule *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, I'm inclined to construe as a mandate the reasoning and conclusion in the *Hanna* case. I find, therefore, that Rule 3 of the Federal Rules of Civil Procedure is controlling in the instant cases."

In *Wheeler v. Standard Tool & Manufacturing Co.*, 311 F.Supp. 1177 (S.D.N.Y. 1970), an action to recover damages for personal injury would have been timely commenced under Rule 3. However, if the court applied New York law, the action would have been barred by the statute of limitations. The District Court held that Rule 3 applied and stated:

"We believe that the present case is governed by *Hanna and Sylvestri* . . . Use of Rule 3 as the proper measure to decide if the action was commenced here for the purpose of determining whether the claim has been asserted prior to the expiration of the New York statute of limitations would not result in forum-shopping. When the plaintiff filed her complaint . . . , she had the choice of commencing the action either in the State Court or the Federal Court and was not forced to resort to the Federal Court because of inability to effectuate service of summons prior to the expiration of the three year statute of limitations.

"It is also readily apparent that application of Rule 3 here does not substantially alter the character or outcome of the litigation from the consequences that would follow in the State Courts." 311 F.Supp., at 1180.

Many other courts have looked to federal law for a definition of the term "commencement of an action in the Federal Courts." See *Alford v. Whitsel*, 52 F.R.D. 327 (N.D. Miss., 1971); *McCrea v. General Motors Corp.*, 53 F.R.D. 384 (D. Mont. 1971); *Newhart v. George F. Hellick Coffee*

Company, 325 F.Supp. 1047 (E.D. Pa., 1971); *Newman v. Freeman*, 262 F.Supp. 106 (E.D. Pa. 1966), and *Ingram v. Kumar*, 585 F.2d 566 (2d Cir., 1978).

In one of the latest decisions on the question presented in this case, District Judge Charles R. Richey, wrote in *Manatee Cablevision Corp. v. Pierson*, 433 F.Supp. 571 (D. D.C., 1977), "This Court joins those authorities which have concluded that *Ragan* has been substantially overruled by *Hanna* and that Rule 3 governs the commencement of actions in Federal Court for the purposes of statutes of limitation."

Other courts have limited the effect of *Ragan* in questioning the validity of the case. In *Prashar v. Volkswagen of America, Inc.*, 480 F.2d 947 (8th Cir., 1973), cert. denied, 415 U.S. 994 (1974), the court noted that the court in *Ragan* had specifically considered the fact that under Kansas law the commencement of actions was an integral part of the statute of limitations. Finding this factor crucial, the Eighth Circuit sidestepped *Ragan* and held that the South Dakota commencement of actions statute at issue in *Prashar* was not an integral part of the State's statute of limitations.

Other decisions have reluctantly followed *Ragan* while expressing a preference for the Federal Rule. In the Tenth Circuit opinion in the case at bar, Judge Doyle, speaking for the court, remarked that "The Supreme Court would perform a great service if it were to clear away the dilemma which exists as a result of the conflict between *Ragan* and *Hanna*." In fact, Judge Doyle parenthetically remarked that he preferred the federal rules. At the very least, *Hanna* and subsequent decisions have cast doubt on the continuing

validity of *Ragan*. If *Hanna* overruled *Ragan*, all questions dealing with commencement should be resolved by looking to Rule 3.

Much of the language in the *Hanna* opinion would seem to point away from the holding of *Ragan*. However, the Supreme Court in *Hanna* did not explicitly overrule *Ragan*. On the contrary, in its opinion, the Supreme Court distinguished *Ragan* in two separate places. As a result, many Federal Courts have held that *Ragan* is still valid. See *Groninger v. Davison*, 364 F.2d 638 (8th Cir., 1966); *Anderson v. Papillion*, 445 F.2d 841 (5th Cir., 1971); and *Witherow v. Firestone Tire & Rubber Co.*, 530 F.2d 160 (3rd Cir., 1976).

Although it would appear that the Supreme Court in *Hanna* avoided overruling *Ragan*, it could be argued that the general approach followed by the Court points to a desirability of applying Rule 3 in diversity cases. The majority in *Hanna* emphasized that there was a need for the federal system to fashion rules of procedure to be followed by the federal judiciary even though the "mode of enforcing state-created rights" might be altered. If Rule 3 was applied in all cases coming before the Federal Courts, uniformity in federal procedure would be greatly enhanced and the undesirable necessity of having to make a number of distinctions between different cases in order to determine when an action was commenced would be avoided.

Petitioner points to Mr. Justice Harlan's concurring opinion in *Hanna*, to state his case:

"I think that the decision (*Ragan*) was wrong. At most, application of the Federal Rule would have

meant that potential Kansas tort defendants would have to defer for a few days the satisfaction of knowing that they had not been sued within the limitations period. The choice of the Federal Rule would have had no effect on the primary stages of private activity from which torts arise, and only the most minimal effect on behavior following the commission of the tort. In such circumstances the interest of the Federal system in proceeding under its own Rules should have prevailed." 380 U.S., at 476-477.

There is much to be said for uniformity in the definition of "commencement of an action" employed by the the Federal Courts in actions based upon diversity of citizenship. Rule 3 of the Federal Rules of Civil Procedure is very clear in mandating that an action is commenced when there is the physical filing of a complaint with the Clerk of a United States District Court. It should then be up to the court to decide if the defendant in the action is served with process within a reasonable time. As Mr. Justice Black observed in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962):

"When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure."

In *Hanna*, the Court recited language of the Fifth Circuit which reads:

"One of the shaping purposes of the Federal Rules is to bring about uniformity in the Federal Courts by getting away from local rules. This is especially true of matters which relate to the administration of legal

proceedings, an area in which Federal Courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules." *Lumbermen's Mutual Casualty Co. v. Wright*, 380 U.S. 472-473, 322 F.2d 759 (5th Cir. 1963).

CONCLUSION

The case at bar presents the Court a clear-cut choice. If Rule 3 of the Federal Rules of Civil Procedure is to be followed by the Federal Judges of this land in determining when a diversity action is commenced for the purpose of tolling a statute of limitation, petitioner can continue to seek remedy for the injuries he has sustained. If the Court chooses to revitalize *Ragan* and determine that state law should be followed in determining when an action is commenced, petitioner's cause of action is forever lost.

Petitioner respectfully prays that the Court reverse the trial court and the United States Court of Appeals for the Tenth Circuit and remand the case for trial on the merits to the United States District Court for the Western District of Oklahoma.

Respectfully submitted,

MANNERS, CATHCART & LAWTER

By DON MANNERS

1510 North Klein

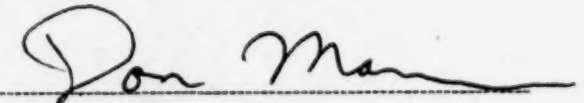
Oklahoma City, Oklahoma 73106

Counsel for Petitioner

November, 1979

CERTIFICATE OF SERVICE

This is to certify that on the 12 day of November, 1979, that the foregoing Brief of Petitioner was served on BURTON J. JOHNSON and RICHARD L. KEIRSEY, of Looney, Nichols, Johnson & Hayes, 219 Couch Drive, Oklahoma City, Oklahoma 73102, attorneys for respondent, by placing same in the United States Mail, postage fully prepaid.



Don Manners

Supreme Court, U.S.
FILED

DEC 18 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit**

BRIEF OF RESPONDENT

LOONEY, NICHOLS, JOHNSON
& HAYES

By Jay M. Galt
and

Richard L. Keirsey

219 Couch Drive

Oklahoma City, Oklahoma 73102

Counsel for Respondent

December, 1979

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT AND CITATION OF AUTHORITY	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

Alford v. Whitsel, 52 F.R.D. 327 (N.D. Miss., 1971) ..	7
Anderson v. Papillion, 445 F.2d 841 (5th Cir., 1971) ..	9
Dial v. Ivey, 370 F.Supp. 833 (E.D. Okl., 1974)	5
Dubosky v. United States, 294 F.Supp. 421 (D.Wyo., 1968)	7
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188	4, 10
Groninger v. Davison, 364 F.2d 638 (8th Cir., 1966) ..	9
Guaranty Trust Co. of New York v. York, 326 U.S. 99..	11
Hanna v. Plumer, 380 U.S. 460 (1965)	6
Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978)	7
Kuhn v. Fairmont Coal Co., 215 U.S. 349, 30 S.Ct. 140, 54 L.Ed. 228	11
Lake v. Lietch, 550 P.2d 935	4, 5
Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118 (1979)	8

AUTHORITIES CONTINUED	PAGE
McCray v. General Motors Corp., 53 F.R.D. 384 (D. Mont., 1971)	6
Newhart v. George F. Hellick Coffee Co., 325 F.Supp. 1047 (E.D. Pa., 1971)	6
Newman v. Freeman, 262 F.Supp. 106 (E.D. Pa., 1966)	7
Nichols v. Eli Lilly, 501 F.2d 392 (C.A. Okl., 1974) —	5
Ragan v. Merchants Transfer & Warehouse Co., Inc., 337 U.S. 530	3
Rose v. K. K. Masutoku Toy Factory Co., 597 F.2d 215 (1979)	8
Smith v. Peters, 482 F.2d 799 (6th Cir. 1933)	7
Swift v. Tyson, 16 Pet. 1, 10 L.Ed. 865	4
Sylvester v. Messler, 351 F.2d 472 (6th Cir., 1965), cert. den. 382 U.S. 1011, 86 S.Ct. 619, 15 L.Ed.2d 526	9
Wheeler v. Standard Tool and Manufacturing Co., 311 F.Supp. 1177 (S.D. N.Y., 1970)	7
Witherow v. Firestone Tire and Rubber Co., 530 F.2d 160 (3rd Cir. 1976)	6, 9
Statutes and Rules	
28 U.S.C. 1354(1)	2
12 O.S. 1971, Sec. 91, et seq.	3
12 O.S.A., Sec. 97 (West Supp. 1978)	2, 4, 5, 8, 12
Federal Rules of Civil Procedure, Rule 3	2
Other Authorities	
4 Wright and Miller, Federal Practice and Procedure: Civil Sec. 1057 at 190-191 (1969)	9

**In the
Supreme Court of the United States**

OCTOBER TERM, 1979

No. 78-1862

FRED N. WALKER,
Petitioner,

VERSUS

ARMCO STEEL CORPORATION,
Respondent.

**On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit**

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in this cause, found at 529 F.2d 1133, appears at page A-11 of the Appendix. The opinion of the United States District Court for the Western District of Oklahoma, found at 542 F.Supp. 243, appears at page A-7 of the Appendix.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment in this case on February 14, 1979. Application for Extension of Time to File a Petition for a Writ of Certiorari was made by the Petitioner and was granted on May 16, 1979, extending the time to June 14, 1979. The Petition for Writ of Certiorari was filed on June 14, 1979, and this Court granted certiorari on October 1, 1979 and evoking the jurisdiction under 28 U.S.C. 1354(1).

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 3:

"Commencement of Action — A civil action is commenced by filing a complaint with the Court."

Oklahoma Statutes Annotated, Title 12, Sec. 97 (West Supp. 1978):

"An action shall be deemed commenced, within the meaning of this article, as to each defendant, at the time of the summons which is served on him or a co-defendant, who is a joint contractor or otherwise united in interest with him. Where service by publication is proper the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to commencement thereof, within the meaning of this article, when the parties faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, or if service is sought to be procured by mailing, by a receipt of certified mail containing summons within sixty (60) days."

STATEMENT OF THE CASE

On August 22, 1975, the Petitioner, Fred N. Walker, was injured. On August 19, 1977, the Petitioner filed a complaint in the United States District Court for the Western District of Oklahoma against the Respondent seeking damages for personal injuries alleging a defect in a manufactured product of the Respondent. Summons was also issued on that date. On December 1, 1977, ARMCO Steel Corporation was served with process and on January 5, 1978, the Respondent filed a Motion to Dismiss for the reason that the action was barred by the applicable state statute of limitations. The Honorable Ralph Thompson sustained the Order to Dismiss on April 18, 1978. On February 14, 1979, the United States Court of Appeals for the Tenth Circuit affirmed the decision.

SUMMARY OF ARGUMENT

In an action brought in Federal Court, jurisdiction being based on diversity of citizenship between the parties, state statute of limitations, in this case, the Oklahoma statutes (12 O.S. 1971, Sec. 91, *et seq.*) are controlling as the substantive law to be followed by the Federal Courts. The particular section in question is not, as the Petitioner argues, in conflict with Rule 3 but merely sets a fixed limit on how long the statute of limitations is to be tolled, and that *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, controls.

ARGUMENT AND CITATION OF AUTHORITY

Since this Court abandoned the doctrine of *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865, in the case of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, and 82 L.Ed. 1188, Federal Courts sitting in cases based upon diversity of citizenship of the parties, have had to apply the state substantive law in dealing with those cases, while applying a uniform federal procedure that governed how those cases would progress to a conclusion. In this matter the Respondent would ask that this Court do exactly that.

There is certainly little doubt that the Federal Courts are bound to follow the limitations of actions set up by the State Courts and that these limitations are substantive in nature. Under various state schemes as well as under the federal scheme there are ways where statutes of limitations may be tolled once the action is timely commenced. Under the law of the State of Oklahoma as announced in 12 O.S. 1971, Sec. 97, there is a limitation as to how long the statute may be tolled even if timely commenced. That period is sixty days. The Oklahoma Supreme Court in the case of *Lake v. Lietch*, 550 P.2d 935, in construing that section, noted that there were no statutes of limitations at common law and that, once enacted and made a part of the statute of limitations, those provisions must be strictly construed and cannot be enlarged upon consideration of inconvenience. And that any exceptions to the strict mandates of the statute of limitations must be contemplated within the statute itself.

The Respondent does not contend that the action was not timely commenced for the Petitioner complied both

with Rule 3 of the Federal Rules of Civil Procedure and the dictates of the applicable Oklahoma statute. In fact, the summons is contained in the Appendix at page A-5, and on its face it shows issuance as of August 19, 1977, and further that it was not delivered unto the Marshal's hand until 11:34 A.M., December 1, 1977, or some one hundred and four days later. It is the position of the Respondent that the commencement was effective in tolling the statute for only sixty days through the dictates of 12 O.S. 1971, Sec. 97. A specific time limit has been set by the Legislature of the sovereign State of Oklahoma and approved in the above cited case of *Lake v. Leitch*, supra. Further, the United States District Court for the Western District of Oklahoma in cases other than this have recognized that Sec. 97 is an integral part of the other sections dealing with the limitations of actions. See: *Dial v. Ivey*, 370 F. Supp. 833 (E.D. Okl., 1974); *Nichols v. Eli Lilly*, 501 F.2d 392 (C.A. Okl., 1974). There is no doubt that the Federal Courts would not invade the province of the State Legislature and State Court to say that the appropriate time period for bringing an action, not arising out of contract, within the borders of the State of Oklahoma should not be two years and it is the position of the Respondent that, likewise, the sovereign State of Oklahoma should have the prerogative to set a time, in this case sixty days, as a maximum for which the two-year statute may be tolled to allow the plaintiff in an action, to give a defendant notice of an alleged cause of action for which it is being sued. It was exactly that sixty days provisions that the Oklahoma Supreme Court said must be strictly construed. Further, in the United States Court of Appeals for the Third Circuit,

in the case of *Witherow v. Firestone Tire and Rubber Co.*, 530 F.2d 160 (3rd Cir. 1976), it was aptly noted that:

"The nub of the policies that underlies *Erie R. Co. v. Thompkins* is that for the same transaction the accident of a suit by non-resident litigant at a Federal Court instead of a State Court a block away, should not lead to a substantially different result. While we avoid mechanical application of the 'outcome determinative' test, or any other single test, we observe that nothing could be more 'substantial' than to allow an action to proceed in Federal Court which would be time barred in the State Court."

The Petitioner argues that this case parallels and should be controlled by *Hanna v. Plumer*, 380 U.S. 460 (1965). A close examination reveals that such should not be the case. *Hanna v. Plumer* dealt with the method by which service was effected upon a defendant. In the case at bar the Respondent received no notice of any type within the time prescribed by Sec. 97. Further, *Hanna* was decided primarily in evaluating the service provisions of the state in comparison to Section 4 of the Federal Rules of Civil Procedure.

Likewise, the plaintiff has cited numerous cases which he contends are applicable and instructive in this matter. However, careful reading of all of the cases shows that in not one instance did the facts parallel the case at bar. In *McCray v. General Motors Corp.*, 53 F.R.D. 384 (D. Mont. 1971) and *Newhart v. George F. Hellick Coffee Co.*, 325 F.Supp. 1047 (E.D. Pa., 1971), the controlling fact was the lack of due diligence in procuring service and, in both cases, due diligence was not found and the position of the de-

fendants was sustained. In *Ingram v. Kumar*, 585 F.2d 566 (2d Cir. 1978) and *Newman v. Freeman*, 262 F.Supp. 106, (E.D. Pa., 1966), involved the addition of causes of action and amendments to complaints after an action had been properly commenced and the defendants served. Also, in *Newman*, supra, the state law was followed. In *Alford v. Whitsel*, 52 F.R.D. 327 (N.D. Miss., 1971), the facts were distinguished from those in *Ragan* specifically by the Court. The Court in *Smith v. Peters*, 482 F.2d 799 (6th Cir. 1933), distinguished this case, in that service was made within the Michigan statute of limitations specifically but then the cause was transferred to Kentucky by the Court and a new summons was issued outside the statute. There obviously the defendant had received service of summons within the statute of the initial state in which the action was brought. *Dubosky v. United States*, 294 F.Supp. 421 (D.Wyo., 1968), was a case when an attempt at service was made within the statute, returned not found, and shortly thereafter served properly. Also, it must be noted, that *Dubosky* is not followed with favor within the Tenth Circuit, within which, it lies. The Petitioner in its quote from the case of *Wheeler v. Standard Tool and Manufacturing Co.*, 311 F.Supp. 1177 (S.D.N.Y., 1970), chose not to include within that quote a statement by the Court that

"... that the circumstance here, while distinguishable from those in *Ragan* ..."

and also the attendant note:

"3. *Ragan* was based on the principal that the cause of action 'created' by Kansas law should also be governed by Kansas law. Here, however, the cause of action arose in Connecticut, not New York."

The Respondent would urge that that distinction, as well as the omitted quote, are quite significant in this case. Of course, in the case at bar, the right sought to be enforced was created under the laws of the State of Oklahoma.

Further, the Petitioner seems to infer that Judge Doyle of the Tenth Circuit reluctantly sustained the trial court in the opinion below. It will be well to note that Judge Doyle, in a later opinion, *Rose v. K. K. Masutoku Toy Factory Co.*, 597 F.2d 215 (1979), declared *Ragan* had originated from the Tenth Circuit and pronounced it still as good law, as he had confirmed in this case below. Further, Judge Logan of the United States Court of Appeals for the Tenth Circuit has, in Judge Doyle's view, offered very well reasoned defense of *Ragan* and distinguished it from *Hanna*, in its application, when discussing the dichotomy between procedure and substance in the case of *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118 (1979), by saying:

"On its face, service of process would seem procedural in the traditional sense. Whether the case commences upon filing or issuance of summons would not appear to have any significant effect upon forum shopping. But it certainly affects the outcome here whether summons must be issued before the end of the statute of limitations. And arguably notification of the defendant is an important purpose of the statute of limitations, and if he has not been served there is little difference to him whether the case has been filed or the case has not been filed." *Lindsey v. Dayton-Hudson Corp.*, supra.

Arriving at this conclusion, the Judge noted that 12 O.S. 1971, Sec. 97 was an integral part of the Oklahoma Statutes' Chapter on Limitation of Actions and was not a

service provision. The Tenth Circuit is certainly not alone in its view and besides *Witherow v. Firestone and Rubber Co.*, supra, in the Third Circuit, others are in accord, see: *Anderson v. Papillion*, 445 F.2d 841 (5th Cir., 1971); *Groninger v. Davison*, 364 F.2d 638 (8th Cir., 1966), and *Sylvester v. Messler*, 351 F.2d 472 (6th Cir., 1965), cert. denied 382 U.S. 1011, 86 S.Ct. 619, 15 L.Ed.2d 526. Nearly all those courts, along with the Tenth Circuit, who have upheld the *Ragan* view, and its distinction from *Hanna*, have been supported by leading commentators on the distinction. Further, the commentators note that the problem in *Ragan* is not contemplated by the Federal Rules of Civil Procedure however, the question in *Hanna* is directly covered by the rules.

"There is some substance to the distinction offered in *Hanna*, particularly in the notion that Rule 3 does not deal with particular problem raised in *Ragan*. By way of contrast, Rule 4 (d) (1) directly covers the situation presented in *Hanna*. Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the Rule does not state that filing tolls the statute of limitations. Thus, *Ragan* and similar cases may still be read as holding that Rule 3 does not determine or measure the point at which certain State created rights are extinguished and that this conclusion is unaffected by *Hana*." (Emphasis added) 4 Wright and Miller, *Federal Practice and Procedure*: Civil Sec. 1057 at 190-191 (1969).

Of course, the Petitioners argument is based in the view that Rule 3 and Section 97 are in direct conflict; the Respondent firmly disagrees with this concept. In fact, the

Petitioner commenced his action timely as to toll the statute of limitations by having summons issued on the day he filed his complaint. But there was a total failure to comply with the further dictates of Section 97 and the summons, once issued, was not delivered to the Marshal or served for one hundred and four days, clearly outside the time-limiting provisions of Section 97, or sixty days. The Respondent would offer no explanation for the Petitioner why service was not effected for the record before this Court is devoid of any activity between August 19, 1977 and December 1, 1977. But, once delivered to the Marshal, service was promptly effected.

CONCLUSION

The Petitioners, as well as others that have taken his view, have had, as a basis for their opinion, that uniformity and ease of interpretation across the United States and all Federal Courts was the deciding and crucial factor. The Respondent submits that respect for the States' right to create rights and control their enforcement is a paramount consideration. Mr. Justice Brandeis, in *Erie R. Co. v. Thompson*, supra, seemed to be more impressed with the States' right than with uniformity when he stated:

"There is no Federal general common law. Congress has no power to declare substantive rights of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or part of the law of torts. And no clause in the Constitution purports to confer such a power upon the Federal Courts."

Mr. Justice Brandeis went on to quote Mr. Justice Holmes when he stated:

"The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that State without regard to what it may have been in England or anywhere else . . . the authority and only authority is the state, and if that be so, the voice adopted by the state as its own (whether it be of its legislature or of its Supreme Court), should utter the last word." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 30 S.Ct. 140, 54 L.Ed. 228.

Further, Mr. Justice Frankfurter commented on the deference that should be afforded to the state law in diversity cases dealing with state-created rights in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, by stating:

" . . . Since a Federal Court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another Court of the state, it cannot afford recovery if the right to recover is made unavailable by the state nor can it substantially affect the enforcement of the right as given by the state."

He went on to say at page 110 that:

"Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a Federal court in a diversity case should follow the State law." *Guaranty Trust Co. of New York v. York*, supra.

The Respondent would respectfully submit that the pronouncements above are still quite applicable. An action, time barred in State Court should likewise be barred in a Federal Court when jurisdiction is based upon diversity of citizenship. In the instant case there was *no* attempt to get service nor was there any unauthorized service.

It is simply and purely a question of time and the application of the statute of limitations found in 12 O.S. 1971, Sec. 97, as enacted by the Oklahoma Legislature. This case does not involve, like *Hanna*, the question of who in the household is served or whether in-hand service was effected, but the fact that no service whatsoever was made or received until outside the specific dictates of 12 O.S. 1971, Sec. 97.

The Petitioner in this case is a resident of the State of Oklahoma (Appendix, p. A-1) and not a foreign citizen seeking to enforce his rights within the boundaries of the State of Oklahoma. He voluntarily chose to avail himself of the Federal Courts through a diversity action, to attempt to recover upon the cause of action alleged in the complaint. Had he availed himself of his own State Court which serves and protects him through his own duly elected representatives and proceeded in the manner followed in the Federal court, *his case would have been barred*. The Respondent submits that the Petitioner's rights may not be

enlarged, nor those of the Respondent lessened, by where the action was filed.

Respectfully submitted,

LOONEY, NICHOLS, JOHNSON
& HAYES

By Jay M. Galt
and

Richard L. Keirsey

219 Couch Drive
Oklahoma City, Oklahoma 73102

Counsel for Respondent

December, 1979